

New Brownfields Law Will Affect Transactions Of Potentially Contaminated Property

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Federal legislation recently signed by President Bush could significantly impact the manner in which sellers and purchasers of potentially contaminated property approach their transactions. Designed to spur brownfields redevelopment by providing Superfund liability relief for owners and operators of environmentally tainted property, the legislation establishes a number of conditions for such relief that parties involved in these transactions will need to take into account.

In the waning hours of its 2001 session, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act.¹ The law is a product of legislation passed by the House of Representatives in May 2001 to provide small business Superfund liability relief,² and the Senate in April 2001 to encourage redevelopment of contaminated properties.³ The statute is designed to accomplish two principal objec-

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tives: (1) promotion of brownfields redevelopment through federal funding, liability relief, and assistance in development of state voluntary cleanup programs, and (2) relief from liability at Superfund National Priority List (“NPL”) sites for certain *de minimis* generators and transporters and generators of municipal solid waste.

Signed into law by President Bush on January 11, the statute should impact significantly both the landscape of brownfields redevelopment deals and Superfund contribution litigation involving “minor” parties. Although properly hailed as one of the more important pieces of federal environmen-

tal legislation in some time, the new law nonetheless presents certain interpretative challenges and embodies limitations that may hamper the range of its utility, especially insofar as its liability relief provisions are concerned.

Interpretation of the law may be aided in certain respects by the relevant Senate and House Committee reports.⁴ However, given the manner of the legislation’s passage, there is no Conference Committee report and only very limited floor debate. Except as expressly indicated below, the following discussion of the statute’s key provisions does not reflect consideration of the Act’s legislative history.

Brownsfields Revitalization Provisions

The provisions for brownsfields revitalization include a multifaceted, although potentially limited, brownfields redevelopment incentive package. Fundamental to that package are federal grants to certain governmental entities and, in limited cases involving remediation, grants or loans to nonprofit organizations or for-profit entities for inventorying, characterizing, assessing, remediating, and planning related to "brownfield" sites. Brownfield sites are defined broadly, with a number of important exceptions, to encompass 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.

The legislation is also intended to stimulate the development of robust state brownfield cleanup programs. Grants by EPA are authorized for states or Indian tribes for development of cleanup programs that are comprised of certain elements. These elements include: (i) the survey and inventory of brownfields sites, (ii) public participation opportunities regarding site cleanups, (iii) oversight and enforcement authorities and resources to ensure that response actions will be completed, protective, and in compliance with applicable law, and (iv) "cleanup plan approval" and "certification of response action completion" mechanisms. These grants may also be used for capitalizing revolving loan funds for brownfields remediation or purchasing insurance for financing response actions under state response programs. The availability of such grants may result in changes in the brownfields programs of certain states as they can seek to qualify for federal financial assistance.

The key to the brownsfields package from the standpoint of real estate developers, however, are three exemptions from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) liability. First, "innocent purchasers" are exempt from CERCLA liability if they meet several conditions. Among other things, these conditions require that the innocent purchaser have (i) conducted "all appropriate inquiries" (as statutorily defined in different ways depending upon the purchase date and whether residential or commercial property is involved) into the presence of contamination at the property prior to purchase, and (ii) taken "reasonable steps" to address releases of hazardous substances at or from the property purchased. Second, "bona fide purchasers" receive a conditional exemption from CERCLA liability as long as they, among several other requirements, ac-

quire ownership after enactment of this law, are not affiliated with other parties at the property being purchased, make all "appropriate inquiries" regarding existing contamination at the property, and take "appropriate care" through "reasonable steps" to address threats from releases of hazardous substances at or from the property they acquire. Unlike prior law, the bona fide purchaser exemption provides relief for parties who take title with knowledge of existing contamination. Finally, a conditional exemption from CERCLA liability is also provided for owners of real property when there is a release or threatened release of a hazardous substance at a contiguous property under different ownership that migrates to their land. Property owners should note that each of these exemptions is from CERCLA liability only, and not from liability under other federal or state laws.

It is important to recognize that despite this liability relief, the new law provides for a lien for the United States for unrecovered federal response costs incurred in cleaning up contaminated property. The lien is available in cases where the owner of the property is not liable by virtue of this legislation and the property's fair market value is increased by federal response actions above that which existed before such actions were taken.

Notably, the brownfields revitalization legislation also restricts EPA's administrative and enforcement authority under CERCLA to order response actions or recover response costs. These enforcement restrictions apply to a "specific release" that is addressed by a response action at an "eligible response site" conducted by others "in compliance with the State program that specifically governs response actions for the protection of public health and the environment." (In addition, the enforcement limitation is restricted to sites where response actions are conducted after February 15, 2001.) The restrictions apply only in states that maintain and publicize a record of sites at which response actions were completed in the previous year (including information on any institutional controls at those sites) or are to be addressed in the upcoming year. However, Congress established no other criteria for the content of state programs for purposes of this liability relief (including those criteria referenced above for purposes of federal financial assistance to state programs).

Despite these restrictions on its authority, EPA is authorized to use the aforementioned enforcement authorities in limited cases. EPA maintains its authority in cases involving (i) a request by a state for federal assistance, or (ii) migration of contamination across state lines or onto federal property. Perhaps

most significantly, however, EPA continues to have enforcement authority at sites where (i) “after taking into consideration the response activities already undertaken,” EPA determines that “a release or threatened release may present an imminent and substantial endangerment to public health or 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 (ii) EPA determines that new information has been discovered after the earlier of the date on which cleanup was approved or completed that indicates that further remediation is required.

Although these provisions, taken as a whole, should provide meaningful incentives to spur brownfield redevelopment, their effectiveness may be limited. For example, as applied to the federal financial assistance provisions of the act, the term “brownfields sites” does not extend to many sites of “federal interest.” These sites include: (i) CERCLA removal action, administrative order or settlement, or proposed or final NPL sites, (ii) Resource Conservation and Recovery Act (RCRA) permit or administrative order sites, (iii) RCRA corrective action sites for which a permit or order has been issued to require “implementation of corrective measures”, (iv) polychlorinated biphenyls (PCB) sites subject to remediation under the Toxic Substances Control Act (TSCA), and (v) many petroleum contamination sites. However, financial assistance may be awarded for such sites on a case-by-case basis upon certain findings.

Another potential limitation on the effectiveness of the provisions are that the “bona fide purchaser” and “contiguous property owner” liability exclusions are conditioned on several factors. Those factors include that the person involved must not be “potentially liable, or affiliated with a person that is potentially liable, for response costs at a facility through any direct or indirect” relationship (emphasis supplied). The use of the term “a facility” (rather than “the facility” involved) suggests that the owner of a particular site might not qualify for a liability exclusion if it is potentially liable for response costs at any other facility, rather than merely the facility being purchased. However, such a reading, while plausible given the use of the term “the facility” elsewhere in these provisions, would seem to undermine what appears to be Congressional intent, especially in light of the legislative history of those provisions (which does use the term “the facility”).

Uncertainty about the steps that a property owner needs to take to meet the three liability exemptions may also limit the effectiveness of the legislation.

Among other things, an owner will need to take measures to address contamination at its property upon discovery of the contamination in order to qualify for any of these three liability exemptions. The required steps are likely to remain unclear for some time and will continue to present uncertainty for those involved in brownfields transactions. Presumably, however, cleanup of eligible sites under state response programs should enable property owners to avoid CERCLA liability — but not liability under other federal or state laws—except in unusual circumstances where EPA might choose to exercise its residual CERCLA or other federal authorities.

In addition, although the “finality” provisions designed to forestall federal order or cost recovery action at sites cleaned up under state response programs are not limited to sites addressed under state programs that qualify for federal assistance, they are limited in a number of very important ways. First, they only apply to CERCLA order and cost recovery authorities, and not other federal or state authorities. Second, they only apply to “eligible response sites”, which exclude, except on a case-by-case basis, certain important categories of sites (*e.g.*, RCRA corrective action sites). Third, the retention of EPA’s authority to use its “imminent and substantial endangerment” authority under CERCLA leaves some uncertainty regarding possible future federal action at sites cleaned up under state response programs (despite repeated EPA protestations, before Congress and elsewhere, that the Agency has never used such authority at sites being cleaned up in compliance with state programs). In any event, because the enforcement bar extends only to the “specific release” under the state program, there will be an incentive to conduct thorough site investigation prior to cleanup in order to strengthen the “assurances” provided by the bar.

Finally, the regulations that EPA is statutorily required to adopt in two years to establish standards for the “appropriate inquiry” necessary to secure liability relief will certainly have a substantial impact on the manner in which environmental due diligence is conducted for real estate transactions. (Until those regulations are adopted, “appropriate inquiry” — for property purchased after May 31, 1997 — consists of the American Society for Testing and Materials (ASTM) Phase I assessment procedures.) At this time, significant uncertainty exists as to the nature and stringency, and therefore, cost and duration, of the due diligence approach EPA will adopt consistent with the statutorily prescribed criteria.

As a result of these provisions, future contaminated property transactions will no doubt involve addi-

tional considerations. For example, purchasers will want to establish a reliable record to demonstrate that disposal occurred entirely pre-acquisition and attempt to strengthen representations from sellers regarding pre-acquisition disposal and release of hazardous substances. Sellers may balk at such broader representations and seek to negotiate purchase price increases or other covenants regarding the purchaser's cleanup and subsequent property use activities. Purchasers will also undoubtedly closely scrutinize the cleanup and other actions they must take to qualify for the bona fide purchaser exemption, and the applicability of, and possible exceptions to, the federal enforcement bar in the event a liability exemption is questionable or unavailable.

Small Business Superfund Liability Relief and Other CERCLA Provisions

CERCLA also was amended to provide liability relief to assist small businesses and other potentially responsible parties escape both CERCLA liability and the costs of defending themselves against certain contribution actions associated with such potential liability. With this legislation, Congress established both *de micromis* party and municipal solid waste (MSW) liability exemptions.

The *de micromis* exemption states that any party, regardless of size, is exempt from generator and transporter liability for response costs (but not natural resource damages) at NPL (but not other) sites if it can demonstrate that the total amount of material containing hazardous substances that it contributed to a site was less than 110 gallons of liquids or less than 200 pounds of solids. However, all or part of the disposal, treatment or transport of hazardous substances must have occurred before April 1, 2001. The exemption does not apply if: (i) the materials could contribute significantly to the cost of response action or natural resource restoration; (ii) the person has failed to comply with a CERCLA information request or administrative subpoena, or has impeded response action or resource restoration at the site; or (iii) the person has been criminally convicted for the conduct to which the exemption would apply.

The burden of proof for the *de micromis* exemption is on a nongovernmental contribution plaintiff to demonstrate that the conditions for the exemption are not met. For actions commenced after the date of enactment (January 11, 2002), unsuccessful nongovernmental contribution plaintiffs (but apparently not unsuccessful nongovernmental cost recovery plaintiffs properly bringing an action under Section 107 of CERCLA) are liable for defense

costs. These costs include reasonable attorneys and expert witness fees of defendants found not liable for contribution based on this exemption.

The MSW exemption provides certain small businesses with relief from CERCLA liability for disposal of relatively "innocuous" waste typically generated by households. The exemption states that any party is exempt from generator liability for response costs (but not natural resource damages) at NPL (but not other) sites if it can demonstrate that it disposed of only "municipal solid waste" (as defined in the statute), without regard to when disposal occurred. The party must also demonstrate that it is one of three types of entities: (i) a person that owns, operates, or leases residential property from which all the MSW in question was generated (a "residential party"); or (ii) a business entity that employed on average, during the three taxable years preceding notification of potential CERCLA liability, not more than 100 full-time individuals, or the equivalent thereof, and was a "small business concern" (within the meaning of the Small Business Act) "from which was generated all of the [MSW] attributed to the entity with respect to the facility" involved; or (iii) a tax-exempt 501(c)(3) organization that employed not more than 100 paid individuals during the taxable year preceding notification of potential CERCLA liability at the location at which the MSW attributed to it was generated.

Unlike the *de micromis* exemption, the MSW exemption does not extend to transporter liability and does not extend to municipalities themselves. In addition, the MSW exemption does not apply if: (i) the MSW could contribute significantly to the cost of response action or natural resource restoration; or (ii) the person has failed to comply with a CERCLA information request or administrative subpoena, or has impeded response action or resource restoration at the site. Note that the third circumstance invalidating the *de micromis* exemption - certain criminal convictions - does not apply in the case of the MSW exemption.

There are several other aspects of the MSW exemption worth mentioning as well. First, no contribution action may be brought at all by any nongovernmental party against a residential party. Second, with respect to contribution actions against small business entities and nonprofit organizations, the burden of proof is on a nongovernmental contribution or cost recovery plaintiff (with respect to MSW disposed of on or after April 1, 2001) or on any contribution or cost recovery plaintiff (with respect to MSW disposed of before April 1, 2001) to demonstrate that the conditions for the exemption have

not been met. Finally, nongovernmental contribution plaintiffs are liable for the defense costs of a defendant that successfully invokes this exemption in the same manner as set forth above in the case of the *de micromis* exemption.

The legislative history of the statute indicates that neither the MSW nor the *de micromis* exemption is intended to affect EPA's existing settlement authority or policies with respect to parties ineligible for CERCLA's exemptions. Consequently, EPA's *de micromis* and MSW settlement policies should remain in force for non-eligible parties at both NPL and non-NPL sites.

In addition to the liability relief provisions discussed above, Congress addressed CERCLA liability with several additional provisions. First, the legislation essentially codifies, with some conditions, EPA's "ability-to-pay" settlement authority. The statute, among other things, (i) provides that EPA is to take into account "the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues"; (ii) requires ability-to-pay settlers to waive their contribution rights absent extenuating circumstances; and (iii) eliminates judicial review of any EPA ability-to-pay determinations.

In addition, the legislation provides that the *de micromis* and MSW liability exemptions and ability-to-pay provisions shall not apply to or in any way affect "any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State, before the date of enactment." Finally, the legislation establishes condi-

tions for deferral of final listings of eligible NPL sites to state voluntary cleanup programs.

The *de micromis* and MSW liability exemption provisions should significantly impact ongoing and future CERCLA contribution actions. In particular, the burden-shifting and attorneys/expert witness fee payment provisions should cause current private contribution plaintiffs to reassess the viability of extant claims and should give future plaintiffs pause before asserting claims to which the exemptions may apply. (Enhanced pre-litigation investigation may be necessary to determine whether potential defendants meet the statutory exemption criteria.) For its part, the NPL-listing deferral provisions should provide states and potentially responsible parties willing to conduct timely response actions at a site under state response programs a valuable tool to forestall NPL listings in many circumstances.

Future CERCLA Legislative Reform

With passage of the Small Business Liability Relief and Brownfields Revitalization Act of 2001, Congress chose to amend only those elements of CERCLA where there was broad consensus. More comprehensive statutory reform is not currently expected, although various issues posed by EPA's response to the September 11 terrorist acts, among other things, may provide impetus for further targeted reforms. ■

Notes

1. See H.R. 2869/Public Law 107-118.
2. See H.R. 1831.
3. See S.350.
4. See Sen. Rep. 107-2, 107th Cong., 1st Sess. (March 12, 2001); H.R. Rep. 107-70, 107th Cong., 1st Sess. (May 21, 2001), Parts 1 and 2.