WHO'S LIABLE NOW?— NEW FEDERAL BROWNFIELDS LEGISLATION

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On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act[1] (the "Brownfields Amendments"). As its name suggests, the act provides relief to small businesses and funding for "brownfields"—"real property, the expansion, re-development, or re-use of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[2] The Brownfields Amendments also significantly amend certain liability-related provisions of the Comprehensive Environmental Response Compensation Liability Act ("CERCLA" or "Superfund"),[3] the environmental statute that dramatically changed the scope of liability for parties owning or dealing with contaminated properties. This article briefly provides background on CERCLA, and then discusses the Brownfields Amendments' liability-related provisions, specifically, new exemptions for generators of waste, provisions for settlement by small businesses, clarifications relating to the innocent land owner exemption, new landowner exemptions and their limitations, and windfall liens.

BACKGROUND

Since the enactment of Superfund in 1980, those performing due diligence in connection with business and real estate transactions should

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be looking not only at liabilities attributable to violations of law, but also at liabilities that arise under Superfund. Unlike other environmental laws, Superfund imposes liability based not on a violation of law, but rather on a person's relationship to a site from which there was a release or threat of release of a "hazardous substance."[4] Those liable under Superfund are referred to as potentially responsible parties or PRPs and include present and certain past owners and operators of a contaminated site, transporters who selected the site, and generators of waste who arranged for disposal of their wastes at the site.[5] Liability is strict—irrespective of fault—and generally, joint and several,[6] and includes costs of investigating and remediating hazardous substance-contaminated sites and natural resource damages attributable to that contamination.[7] The worst of sites containing hazardous substances are included on an ongoing list developed by the United States Environmental Protection Agency (EPA) called the National Priorities List (NPL).[8] The NPL is significant because in addition to bringing an administrative or civil action to compel clean up,[9] EPA may utilize funds from the "Superfund" to investigate and remediate NPL sites and pursue cost recovery. [10]

Many states have adopted programs comparable to Superfund. In Texas, the Texas Solid Waste Disposal Act creates an alternative basis of liability, modeled after Superfund.[11] The state Superfund program, however, differs from the federal program in a number of ways; for example, it applies to sites contaminated with solid waste, including petroleum.

The effect of Superfund and its state analogs was to discourage parties from participating in transactions involving contaminated properties. Although CERCLA was amended in 1986, by the Superfund Amendments and Reauthorization Act (SARA),[12] to include some business-friendly changes,[13] it continued to impede transactions. In response, EPA developed policies to ameliorate the effects of CERCLA on real estate transactions and development involving Brownfields.

Recognizing the inequity of holding landowners responsible for contamination that migrated in aquifers under their properties from off-site sources, EPA published guidance that protected them, relying on the agency's statutory de minimis settlement authority.[14] To encourage prospective purchasers to participate in transactions involving contaminated properties, EPA also developed a "prospective purchaser" program applicable to properties for which Superfund enforcement was imminent, which allowed purchasers to enter into "prospective purchaser agreements" to obtain a release from liability in exchange for a cash payment and other commitments to EPA.[15] The Brownfields Amendments, among other things, added two new generator and two new land owner exemptions, clarifying and codifying aspects of the policies that EPA had developed.

NEW GENERATOR PRP EXEMPTIONS

The Brownfields Amendments newly exempt two classes of generator PRPs from liability for NPL sites: (1) arrangers (and transporters) of de micromis amounts of materials, if the amounts of the materials they disposed of are under prescribed quantities,[16] and (2) specified arrangers, i.e., residential property owners or operators, small businesses, and tax exempt institutions, that generated municipal solid waste.[17] These exemptions operate as defenses and are conditional. Among other things: (1) the waste must not have contributed significantly to the costs of response and natural resource restoration; (2) the person must not have failed to comply with information requests; (3) the person must not have interfered with the remedial action; and (4) with respect to the de micromis exemption, all or part of the disposal, treatment, or transport of the wastes must have occurred before April 1, 2001.[18]

In general, the Brownfields Amendments proscribe contribution actions against these two classes of PRPs, other than by governmental entities, and impose the burden of establishing that these PRPs are not within the exemption on those seeking to recover from them.[19] They further authorize those newly-exempted PRPs to recover reasonable costs of defending the action, including attorneys and expert fees, if they are found not liable for contribution based on the exemption.[20] The exemptions do not on their face apply to contaminated sites not on the NPL, limiting their value.

SETTLEMENT BY SMALL BUSINESSES

For small businesses, the Brownfields Amendments provide another benefit. They amend CERCLA to allow parties who are unable or of limited ability to pay response costs to expeditiously settle for small amounts.[21] They also authorize them to use alternative payment methods. To qualify, the business also must not fail to provide information or access.

INNOCENT LAND OWNERS—ALL APPROPRIATE INQUIRY

Under CERCLA as originally enacted, PRPs can avoid liability if they can show that the release or threat of release of hazardous substances and the resulting damages were caused solely by: (1) an act of God; (2) an act of war; (3) an act or omission of a third party; or (4) any combination of these causes.[22] In addition, they must show that they exercised due care with respect to the hazardous substances and took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[23] The so-called third-party defense is not available if the third party is one whose act or omission occurred in connection with the contractual relationship with the PRP.[24] While some courts have required that there be a nexus between the act or omission of the seller and the contractual relationship with the PRP,[25] others have ignored this requirement and have found the defense inapplicable if any contractual relationship exists.[26]

Because of concern that a contractual relationship could vitiate the third party defense, SARA added the so-called innocent landowner defense. Under this defense, even if the proscribed contractual relationship were present, the PRP nonetheless can avoid liability if it can show that it satisfied the requirements for being an innocent landowner: at the time of acquisition, the PRP did not know and had no reason to know that any hazardous substances were disposed at the facility.[27] The standard for determining the adequacy of the due diligence investigation is whether the PRP made "all appropriate inquiry."[28] The Brownfields Amendments clarify the definition of contractual relationship and the due diligence standard.

The Brownfields Amendments include easements and leases as well as deeds as examples of the type of contractual relationship that may trigger the need for the innocent land owner defense.[29] They require a person seeking protection under this exemption: to fully cooperate with the response actions and natural resource restoration; to comply with land use restrictions; and to not impede the integrity of institutional controls.[30] They also expand upon the "all appropriate inquiry" standard by explaining that the defendant must carry out all appropriate inquiry into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices and, significantly, take reasonable steps to stop any continuing release, prevent any threatened future release, or prevent or limit any human, environmental, or natural resource exposure to any released hazardous substances, going beyond the "due care" requirement of the original act.[31]

Within two years of enactment, the EPA Administrator must promulgate regulations describing "all appropriate inquiry," which are to include: (1) results of an inquiry by an environmental professional; (2) interviews with past and present owners, operators, and occupants; (3) reviews of historical sources; (4) searches for recorded environmental cleanup liens; (5) reviews of governmental and other records; (6) visual inspection of the facility and adjoining properties; (7) specialized knowledge or experience on the part of the defendant; (8) the relationship of the purchase price to the value of the property if the property was not contaminated; (9) commonly known or reasonably ascertainable information about the property; and (10) the degree of obviousness of the presence or likely presence of contamination of the property, and the ability to detect the contamination by appropriate investigation.[32]

With respect to property purchased before May 31, 1997, the court is required to take into account a subset of the prescribed factors.[33] With respect to property purchased on or after that date, until the Administrator promulgates regulations, the ASTM 1997 standards for environmental site assessments satisfy the requirements for "all appropriate inquiry."[34] For a residential property, a facility inspection and title search that reveal no basis for further investigation are generally adequate.[35]

OWNERS OF PROPERTIES CONTIGUOUS TO CONTAMINATION SOURCES

The Brownfields Amendments create a new landowner exemption from Superfund liability

applicable to a person who owns real property that is contiguous to[36] and that is or may be contaminated by a release or threatened release of a hazardous substance from real property not owned by that person, provided certain conditions are met.[37] This exemption applies to circumstances similar to those addressed in EPA's landowner policy regarding liability for subsurface migration from off-site sources.[38]

To qualify for the exemption, the person must, among other things: (1) not have caused, contributed, or consented to the release; (2) not be potentially liable or affiliated with any person potentially liable for the release; (3) take reasonable steps to stop any continuing release, to prevent any threatened release, and to prevent or limit human, environmental, or natural resource exposure to any hazardous substances released from that person's property; (4) provide full cooperation and access to persons authorized to conduct response actions or natural resource restoration; (5) comply with any applicable land use restrictions and not interfere with any institutional controls; (6) comply with requests for information; (7) provide all legally required notices; (8) and at the time at which the person acquired the property, have conducted all appropriate inquiry and not know or have reason to know that the property was or could be contaminated by the adjacent property. [39]

The Brownfields Amendments clarify that owners of property whose groundwater is contaminated from offsite sources generally need not conduct groundwater investigations or install groundwater remediation systems.[40] For these types of newly exempted PRPs, the Administrator is authorized to issue an assurance of no enforcement action or "comfort letter," and to enter into settlements that would confer contribution protection.[41]

In Texas, the Innocent Owner/Operator Program ("IOP") is available for the purchaser of contaminated property who can demonstrate that the contamination on its property is solely attributable to a third party. [42] Unlike the Brownfields Amendment contiguous property owner exemption, under the IOP, the property owner or operator may obtain a release from liability to the state, not merely a defense to liability. Moreover, unlike the Brownfields Amendments' exemption, the IOP does not require due diligence prior to purchase and is not lost by pre-acquisition knowledge of contamination; it may be obtained after the property is purchased.

Of greatest significance, the Brownfields Amendments address a shortcoming of the innocent landowner defense, by affording a defense to prospective purchasers who, upon all appropriate inquiry, discover contamination, by institutionalizing some of the benefits of a prospective purchaser agreement.

BONA FIDE PROSPECTIVE PURCHASER DEFENSE

Both the innocent land owner defense and the new contiguous land owner defense of CERCLA are unavailable if the person performs the investigation and determines that contamination is present. In other words, prospective purchasers who conduct all appropriate inquiry and discover contamination are not protected from CERCLA liability. To assist this type of purchaser, EPA's prospective purchaser policy allowed that person to enter into prospective purchaser agreements or PPAs, on a case-by-case basis, pursuant to which the agency would release the purchaser from liability in exchange for monetary and other consideration. The Brownfields Amendments, to some extent, institutionalize this practice by exempting so-called bona fide prospective purchasers from liability.[43]

The term "bona fide prospective purchaser" is defined as a person (or a tenant of a person) that acquires ownership of a facility and that can establish certain elements by a preponderance of the evidence.[44] These elements include : (1) that disposal occurred prior to acquisition; (2) that the person made all appropriate inquiry into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; (3) that the person provided all legally required notices; (4) that the person is exercising appropriate care with respect to the hazardous substances by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substances; (5) that the person is fully cooperating with the party authorized to conduct response or

natural resource restoration actions; (6) that the person is complying with land use restrictions and is not impeding any institutional controls; and (7) that the person is responding to information requests. The exemption is not available if the person is affiliated with the party liable for the contamination.[45]

EPA recently issued a policy expressing its belief that, in most cases, the Brownfields Amendments make PPAs unnecessary.[46] The two situations the agency acknowledges where PPAs still would be available are if there is likely to be a significant windfall, as a mechanism to address it, and if the PPA is necessary to ensure that a project that would benefit a local community will go forward. Texas has a voluntary cleanup program that allows prospective purchasers of contaminated properties to obtain a release of liability to the state for costs of investigation and remediation, but this program, unlike the CERCLA exemptions, does require that the purchaser remediate the site.[47]

LIMITATIONS ON NEW LANDOWNER EXEMPTIONS

The two new landowner exemptions—the contiguous property owner and bona fide prospective purchaser exemptions—have some limitations in common. Unlike the PPA, which provides a release from liability, the new exemptions provide a defense, which must be asserted and proved. Also, the exemptions operate as defenses under Superfund, but not other federal statutes, like the Resource Conservation and Recovery Act (RCRA), and not under state statutes, like the Texas Solid Waste Disposal Act. The defenses also do not protect against common law claims, e.g., based on trespass or nuisance. In addition, because of the CERCLA petroleum exclusion, sites contaminated with gasoline or other petroleum products generally are excluded from Superfund coverage and are generally addressed under other statutes, e.g., RCRA. For that reason, purchasers of those sites cannot obtain protection under the exemptions.

WINDFALL LIENS

If there are unrecovered federal response costs at a site, the United States may impose a lien on the site, or negotiate some other assurance of payment with the site owner, for the unrecovered response costs.[48] The amount of the lien, however, may not exceed the increase in fair market value of the site attributable to the response action, as of the time of sale.

CONCLUSION

The Brownfields Amendments provide relief to small businesses and revitalize brownfields. They also significantly amend certain of the liability provisions of CERCLA, providing, among other things, two new landowner exemptions, which should encourage Brownfields transactions. Of greatest significance, they address a shortcoming of the innocent landowner defense, by affording a defense to prospective purchasers who, upon all appropriate inquiry, discover contamination, by institutionalizing some of the benefits of a prospective purchaser agreement.

ENDNOTES

1. Small Business Liability Relief And Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified in various sections at 42 U.S.C. §§ 9601-9675).
2. Brownfields Amendments § 211(a) (codified at 42 U.S.C. § 9601(39)). The Senate Committee Report cites an estimate that there are more than 450,000 brownfield sites nationwide. S. Rep. 107-2 (2001).
3. 42 U.S.C. §§ 9601-9675 (2002).
4. 42 U.S.C. § 9601(14) (2002). Although Superfund broadly defines the term "hazardous substance," it excludes from that definition petroleum and petroleum products, and thus sites contaminated by gasoline and other petroleum products do not fall within its ambit.
5. 42 U.S.C. § 9607(a). Past owners and operators of a contaminated site who are liable under CERCLA are those who owned or operated the site at the time of disposal of hazardous substances.
6. Jeff Knebel & Mary Reagan, Texas Superfund, 45 Texas Environmental Law 405, West Group's Texas Practice Series (1997) (2001 pocket update).
7. 42 U.S.C. § 9607(a) (2002).
8. 42 U.S.C. § 9605(a)(8)(B) (2002).
9. 42 U.S.C. §§ 9606(a) and 9607(a) (2002).
10. 42 U.S.C. § 9611 (2002).
11. TEX. HEALTH & SAFETY CODE ANN. §§ 361.271-345 (Vernon 2001 & Supp. 2002).
12. Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. §§ 9601-9675).
13. The 1986 SARA amendments added an "innocent landowner defense." 42 U.S.C. § 9601(35)(A) (defining the term "contractual relationship.")They also authorized EPA to enter into de minimis settlements with the owner of a contaminated property if that person did not conduct hazardous substance management activities and did not contribute to the release of hazardous substances. 42 U.S.C. § 9622(g).
14. Diamond, EPA Office of Site Remediation Enforcement, to EPA Regional Counsel, et. al.(May 24, 1995) ("Final Policy Toward Owners of Property Containing Contaminated Aquifers"); see also 60 Fed. Reg. 31,995 (July 3, 1995).
15. See Guidance on Settlements with Prospective Purchasers of Contaminated Property (OSWER Directive No. 9835.9, and 54 Fed. Reg. 34,235 (Aug. 18, 1989)); see also Breen, EPA, & Bruce Gelber, DOJ, to Superfund Senior Policy Managers et al. (Jan. 10, 2001) ("Support of Regional Efforts to Negotiate Prospective Purchaser Agreements (PPAs) at Superfund Sites and Clarification of PPA Guidance").
16. See Brownfields Amendments § 102(a) (codified at 42 U.S.C. § 9607(o)).
17. See id. (codified at 42 U.S.C. § 9607(p)).
18. See id. (codified at 42 U.S.C. §§ 9607 (o) and (p)).
19. See id.
20. See id. (codified at 42 U.S.C. § 9607(p)(7)).
21. See id. (codified at 42 U.S.C. § 9622(g)).
22. 42 U.S.C. § 9607(b) (2002).
23. Id. at § 9607(b)(3).
24. Id.

25. See State of N.Y. v. Lashins Arcade Co., 91 F. 3d 353, 360 (2nd Cir. 1996); Westwood Pharmaceuticals, Inc. v. Nat'l Fuel Gas Dist. Corp, 767 F. Supp. 456, 460 (W.D.N.Y. 1991), aff'd 964 F. 2d 85, 89 (2nd Cir. 1992).
26. See, e.g, Idylwoods Assoc. v. Mader Capital, Inc., 915 F. Supp. 1290, 1299-1300 (W.D.N.Y. 1996); United States v. Pacific Hide & Fur Depot, Inc., 716 F. Supp. 1341 (D. Id. 1989). It should be noted that an owner of a property who has actual knowledge of the presence of a hazardous substance and transfers ownership of that property without disclosing that fact becomes liable under 9607(a)(i) and loses any defense under 9607(b)(13). 42 U.S.C. §9601(35)(C).
27. 42 U.S.C. § 9607(b)(3) and § 9601(35)(A)(i).
28. 42 U.S.C. § 9601(35)(B).
29. Brownfields Amendments § 223 (codified at 42 U.S.C. § 9601(35)).
30. Id.
31. Id.
32. Id. (codified at 42 U.S.C. § 9601(35)(B)).
33. Id.(codified at 42 U.S.C. § 9601(35)(B)(iv)(I)). Specifically, factors (7) through (10).
34. Id. (codified at 42 U.S.C. § 9601(35)(B)(iv)(II)).
35. Id. (codified at 42 U.S.C. § 9601(35)(B)(v)).
36. The exemption also includes properties that are "otherwise similarly situated." Id. (codified at 42 U.S.C. § 9607(q)). It is unclear in what way the quoted language is intended to modify the contiguity requirement.
37. Id. (codified at 42 U.S.C. § 9607(q)).
38. See Diamond, supra note 14.
39. Id. (codified at 42 U.S.C. § 9607(q)(1)(A)).
40. Id. (codified at 42 U.S.C. § 9607(q)(1)(D)).
41. Id. (codified at 42 U.S.C. § 9607(q)(3)).
42. TEX. HEALTH & SAFETY CODE ANN. §§ 361.751-754 (Vernon 2001 & Supp. 2002).
43. See Brownfields Amendments § 223 (codified at 42 U.S.C. § 9607(r)).
44. Id. (codified at 42 U.S.C. § 9601(40)).
45. Id.
46. Breen, EPA Office of Site Remediation Enforcement, to EPA Superfund Senior Policy Managers, et. al.(May 31, 2002) ("Bona Fide Prospective Purchasers and the New Amendments to CERCLA").
47. TEX. HEALTH & SAFETY CODE ANN. §§ 361.601-613 (Vernon 2001 & Supp. 2002).
48. See Brownfields Amendments § 223 (codified at 42 U.S.C. § 9607(r)(2)).