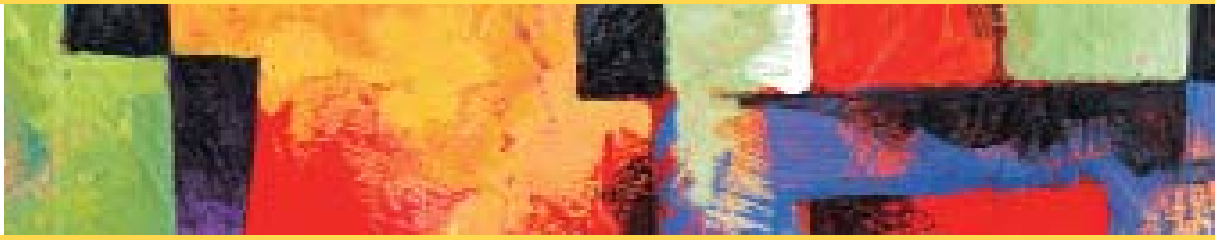

CERCLA AMENDMENT CREATES NEW EXEMPTIONS AND DEFENSES

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PROTECTS AGAINST LIABILITY FOR CLEANUP COSTS, ENCOURAGES REDEVELOPMENT OF BROWNFIELDS

The Small Business Liability Relief and Brownfields Revitalization Act, signed into law on Jan. 11, 2002, by President Bush, encourages the redevelopment of brownfields. With the protections now afforded under both CERCLA and New Jersey law, developers and innocent property owners enjoy certain protections from liability for significant cleanup costs, with the proviso that liability still exists under federal law for underground storage tanks.

Additionally, small businesses and individuals have obtained protection from private party contribution actions when their waste disposal activity did not likely contribute to contamination at a disposal site.

Throughout the nation, polluted properties have been abandoned because developers and property owners were concerned that they would become liable for significant cleanup costs. During the last few years, New Jersey has been modifying its laws in response to suggestions made by municipalities and business groups that limiting potential liability would allow these brownfields to be put back into productive use.

This is especially useful in depressed urban areas, where redevelopment would put idle land back on the tax rolls and stimulate economic activity. Despite changes on the state level, property owners and developers still faced significant potential cleanup liabilities under the federal Comprehensive Environmental Response, Compensation and Liability Act.

The Small Business Liability Relief and Brownfields Revitalization Act has two distinct but related components. First, the "Small Business Liability Protection Act" provides CERCLA liability relief for small businesses and others who disposed of, or arranged disposal of, small amounts of hazardous waste. The legislation also allows expedited settlements if a business can show financial hardship.

Second, the "Brownfields Revitalization and Environmental Restoration Act" authorizes $250 million a year over the next five years for assessment and cleanup grants for brownfield sites, as newly defined, and also for state program enhancements.

In addition, it provides liability relief for contiguous property owners, prospective purchasers and innocent landownerswhile outlining new parameters by which the Environmental Protection Agency may list a site on the National Priorities List.

SMALL BUSINESS LIABILITY ACT

This component of the act amends CERCLA to provide a "de micromis exemption" (42 U.S.C.A. 9607(o)) that transporters and arrangers/generators shall only be liable for response costs at a National Priorities List facility if the total quantity of material containing a hazardous substance was greater than specified amounts as set forth in the statute and as further clarified in regulations to be issued by the EPA.

It also exempts a person from liability for response costs at a National Priorities List facility for municipal solid waste, as newly defined, if the person is an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated, or a small business or small charitable tax-exempt organization that generated only municipal solid waste. (42 U.S.C.A. 9607 (p)).

Lastly, it revises conditions for de minimis settlements based on an ability to pay, effectively permitting by legislation what had typically been the practice of the government in negotiating settlements in CERCLA actions. (42 U.S.C.A. 9622 (g)(7-12)).

DE MICROMIS LIABILITY EXEMPTION

Under CERCLA prior to this enactment, it was not a liability defense that a potentially responsible party's disposal of hazardous waste at a site was so minimal that it could not have logically caused or enhanced the cost of the cleanup. Instead, a party in this situation either had to settle or demonstrate divisibility, an extremely difficult and expensive defense to prove.

Under newly enacted 42 U.S.C. 9607(o), there is now a CERCLA "de micromis" liability exemption. It applies whether the potentially responsible party is a small business or not. In order to qualify, (1) the party must be an arranger or transporter within the meaning of 42 U.S.C. 9607(a); (2) the total amount of the party's material containing hazardous substances is less than 110 gallons of liquid materials or less than 200 pounds of solid materials; and (3) the disposal must have occurred in part before April 1, 2001.

There are three exceptions to this exemption: (1) the EPA determines that the potentially responsible party's hazardous substances have or could significantly contribute to the cost of the cleanup; (2) the EPA determines that the party has not complied with an information request or subpoena, or has otherwise impeded the response action; or (3) the party has been convicted of a "criminal violation" for the conduct to which the exemption applies. There is no judicial review permitted if the EPA invokes the first two exceptions.

The most important aspect of this exemption, however, is the provision that in a contribution action, a nongovernmental entity must prove a negative, that is, that a potentially responsible party does not fall within the de micromis exemption. Thus, a substantial potentially responsible party at a site that brings a major contribution action against hundreds of other parties now runs the risk that it may be unable to prove that certain parties do not fall within this exemption. The penalty for this failure is that exempted parties "shall" recover counsel fees under the new act.

Interestingly, the act's language seemingly permits a municipality or other government entity that is a major potentially responsible party at a site, such as the owner or operator, to bring a contribution action against de micromis parties. In that situation, the defendant bears the burden of proof to exculpate itself under the de micromis exemption. There is no logical explanation for this distinction.

Lastly, there is no comparable demicromis exemption under the New Jersey Spill Compensation and Control Act. This difference will undoubtedly lead to parties in New Jersey cases invoking the Spill Act as a basis for their contribution actions and parties resisting on a variety of legal grounds such as implied preemption.

MUNICIPAL SOLID WASTE EXEMPTION

Entities that only dispose of municipal solid waste at a hazardous site have long complained that CERCLA's liability scheme unfairly encompasses their actions when the site contamination and resulting cleanup are caused by industrial polluters — often the very parties which are suing them in a contribution action. In the Small Business Liability Act, Congress has attempted to address this by enacting a municipal solid waste liability exemption.

Unlike the de micromis liability exemption, however, this exemption applies to a limited group of individuals and businesses: (1) an owner, operator or lessee of residential property (such as an apartment building) from which all that party's municipal solid waste was generated; (2) small businesses that only disposed of municipal solid waste; and (3) small charitable organizations that only dispose of municipal solid waste.

Noticeably absent from the specified persons and entities that may claim this liability exemption are municipal and other local governmental entities.

Further, there is no statutory language addressing the situation in which a small business seeks a liability exemption under a combination of the de micromis and municipal solid waste provisions.

Municipal solid waste is a defined term: (1) waste material generated by households including a multifamily residence; and (2) commercial waste that is: (i) "essentially the same" as household, (ii) collected and disposed of with residential waste, and (iii) contains a quantity of hazardous waste similar to single family homes.

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The definition of municipal solid waste specifically excludes combustion ash from municipal incinerators (thus suggesting a municipality might otherwise be exempt). It also excludes waste from manufacturing processing operations "that is not essentially" the same as household waste.

The federal government has the unreviewable discretion to determine that the municipal solid waste exemption does not apply if the municipal solid waste has contributed significantly to the cleanup and/or the defendant is then uncooperative. Also, like the de micromis exemption, the key feature in the municipal solid waste exemption is that the burden of proof is placed on private parties bringing a contribution action to prove that the exemption does not apply. Once again, the penalty for suing exempted defendants is that counsel fees "shall" be awarded.

EXPEDITED SETTLEMENT

The Small Business Liability Protection Act also formally codifies the government's existing practice in settling CERCLA liability actions. In particular, a defendant with "limited ability" to pay response costs may now seek to settle with the government under this newly added section. The party seeking relief must provide "all relevant" financial information. The government in determining to settle is to take into consideration "the ability of the person to pay response costs and still maintain basic business operations including ... demonstrable constraints on the ability of the person to raise revenues."

If the government decides to settle with the "limited ability to pay defendant, it must notify other PRPs [potentially responsible parties]at the site of the settlement." If it decides not to settle, it must explain the decision to the defendant in writing.

Significantly, in either scenario, the government's decision to settle "shall not be subject to judicial review." How this latter provision interacts with other provisions in CERCLA that provide for limited judicial oversight of consent decrees remains to be seen. This new provision likely will be used by the government to further impose orphan shares on other viable potentially responsible parties.

The New Jersey Spill Act has no similar provision, but the state government often takes the financial situation of a defendant into consideration when settling. Thus, this new difference between the two statutory schemes should not be significant.

BROWNFIELDS RESTORATION ACT

In the Brownfields Revitalization and Environmental Restoration Act, the term brownfield site means any real property at which expansion, redevelopment or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant or contaminant. However, there are many exclusions to the term brownfield site.

These exclusions include sites that are the subject of planned or ongoing removal actions, sites that are proposed for, or are listed on the National Priorities List, sites that are the subject of various administrative or court orders, or that received a permit under a variety of federal environmental statutes, and sites where a cleanup of polychlorinated biphenyls is subject to remediation under the Toxic Substances Control Act.

There are four main themes in the Brownfields Act. First, the act defines the criteria for pre-acquisition due diligence that must be satisfied in order to benefit from the Innocent Landowner defense to CERCLA liability.

Second, the act provides certain protections from CERCLA liability for owners of properties that are contiguous to contaminated property and prospective purchasers of contaminated property.

Third, the act limits the ability of the federal government to take actions to recover CERCLA response costs against any person who completed the remediation of a brownfield site under the oversight of a state response program. Although each of these liability protections is limited, these provisions, along with New Jersey's liability protections, should encourage prospective purchasers to redevelop brownfield sites.

Fourth, the act provides funds to state and municipal agencies, and Indian tribes, to inventory, characterize, assess and remediate brownfield sites. The Brownfields Act also provides funds for eligible state response programs and voluntary cleanup programs.

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INNOCENT LANDOWNER AND PROSPECTIVE PURCHASER DEFENSE

Under prior federal law, the current owner of contaminated property would be liable under CERCLA to perform a cleanup, even if the property was contaminated before the owner acquired it.

In 1986, CERCLA was amended to provide a defense to liability if at the time of acquisition the owner undertook all appropriate inquiries and did not know that the property was contaminated. However, CERCLA did not clearly define the criteria that would satisfy the "all appropriate inquiries" requirement.

The Brownfields Act sets forth specific criteria. For nonresidential property, the applicable standard for the next two years is the procedures set forth by the American Society for Testing and Materials (Standard Practice E1527-97, entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process").

The EPA is to promulgate new standards within two years, to replace the ASTM protocol. For the purchase of residential property by a nongovernmental or noncommercial entity, "all appropriate inquiries" merely means an inspection and title search that reveals no basis for further investigation.

Additionally, the property owner must exercise appropriate care of any hazardous substances found at the property by taking reasonable steps to prevent and stop any release, and to prevent or limit human, environmental or natural resource exposure to, any previously released hazardous substance.

However, the Brownfields Act does not impose upon the new purchaser the obligation to investigate or cleanup the release of hazardous substances.

The Brownfields Act extends the Innocent Landowner defense to the acquisition of a contaminated property by a "bona fide perspective purchaser."

A bona fide perspective purchaser is defined to mean a person (or that person's tenant) that acquired ownership of a contaminated property after the enactment of the Brownfields Act, and is able to establish the following by a preponderous of the evidence:

• The property was contaminated before the new owner acquired it and, before acquiring the property, the new owner made "all appropriate inquiries" into the previous ownership and uses of the property in accordance with generally accepted good commercial and customary standards and practices.

• The new owner must provide all legally required notices with respect to the discovery or release of hazardous substances at the property, and must comply with any request for information issued by the EPA under CERCLA.

• The new owner must provide full cooperation, assistance and access to all parties that are authorized to conduct a response action or natural resource restoration at the property, and must comply with any land-use restrictions related to the response action and must not impede the effectiveness of any institutional control.

• The new owner is not potentially liable, or affiliated with any other entity that is potentially liable, for the response costs at the property.

When a brownfield site is cleaned up, the value of the property will likely be enhanced. Under the Brownfields Act, if the federal government is unable to recover its response costs from third parties, it may impose a "windfall lien" on the property. The amount of the lien is not to exceed the increase in fair market value of the property attributable to the response action. The lien may be satisfied upon the sale of the property.

Thus, prospective purchasers may either have to purchase the property subject to this windfall lien or it may be placed on the property during remediation. The legislation is silent as to the priority of this lien and how it will impact the purchaser's financing.

It does envision, however, that the government should be flexible since the government "may by agreement with the owner, obtain ... a lien on any other property or other assurance of payment satisfactory to the Administrator."

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There is a significant exception to the Brownfields Act's prospective purchaser liability defense. A purchaser is not shielded from liability arising from underground storage tanks regulated under the Resource Conservation and Recovery Act, nor the cleanup of polychlorinated biphenyls that require cleanup under the Toxic Substances Control Act. Unfortunately, many brownfield sites are contaminated by discharges from abandoned underground storage tanks.

In comparison to this new federal bona fide prospective purchaser liability defense, the 1997 amendment to New Jersey's Spill Act requires that the new property owner undertake remediation of a discharge.

However, the Spill Act provides the new owner with protection against liability for cleanup and removal costs or damages under any state law to any person, other than the state or federal government, harmed by any hazardous substance discharged on that property prior to acquisition and any migration off the property, provided certain conditions are met.

CONTIGUOUS PROPERTIES

Owners of properties adjacent to contaminated sites have been concerned that they may be liable under CERCLA for contamination migrating onto their properties from off-site. The Brownfields Act amends CERCLA by specifically providing liability protection to contiguous property owners under certain limited circumstances.

Generally, in order to be eligible for liability protection, the contiguous property owner must have satisfied many of the same conditions as the bona fide prospective purchaser. Additionally, in order to qualify for the liability protection, the contiguous property owner must not have caused, contributed or consented to the release.

In addition, the contiguous property owner must take reasonable steps to prevent and stop any release and prevent or limit human, environmental or natural resource exposure to any hazardous substance released on or from property owned by that person. This obligation appears to relate to releases that occurred on the contiguous property, not releases that originated on the adjacent contaminated property and migrated onto the contiguous property. Otherwise, the result would be to punish an innocent property owner merely for being in the vicinity of a contaminated site.

At the time of acquisition, the contiguous property owner must have conducted all appropriate inquiry and must not have known or have had reason to know that the property was or could be contaminated by a release of hazardous substances from other real property not owned or operated by the contiguous property owner.

In other words, a contiguous property owner would have to be an innocent purchaser in order to qualify for this liability protection. However, the statute provides that any person that does not qualify for liability protection as a contiguous property owner may qualify for liability protection as a bona fide prospective purchaser.

The statute also provides that a contiguous property owner cannot be required to conduct a groundwater investigation or install a groundwater remediation system solely to address the migration of contamination in an aquifer, except in accordance with the EPA's May 24, 1995, policy concerning owners of property situated on contaminated aquifers.

This policy document generally provides that the EPA will not take enforcement action against a property owner to address groundwater contamination when the contamination has come to be located on the property solely as a result of subsurface migration, unless the property owner is otherwise liable.

Although groundwater is the most common media to migrate, this provision does not provide liability protection for the migration of other contaminated media, such as the contaminated sediment that affects properties adjacent to the Hudson River. New Jersey's Brownfield and Contaminated Site Remediation Act provides that a property owner will not be required to investigate or remediate contamination coming onto the site from a property that is owned and operated by another party, unless the property owner is in any way responsible for the discharge. (N.J.S.A. 58:10B- 12f(5)).

The act also provides that a property owner is not responsible to remediate groundwater contamination to a concentration lower than the level migrating onto the property from off-site. (N.J.S.A. 58:10B-12f(6)).

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BARRING ENFORCEMENT AGAINST CLEAN PROPERTIES

Previously, the EPA theoretically had the authority to compel response actions in accordance with CERCLA standards or recover response costs at sites that had been addressed in compliance with state standards.

Although the EPA rarely took such steps, the potential to do so caused uncertainty that may have reduced the willingness of property owners to redevelop their properties. The Brownfields Act provides that the federal government may not take administrative or judicial enforcement actions, to order a response action or recover response costs incurred to address a specific release, against a person who conducted or completed a response action of that specific release in compliance with a state program.

This bar against enforcement only applies to response actions at an eligible brownfield site, which does not include any property at which the EPA conducts or has conducted a preliminary assessment or site inspection, and after consultation with the state, determines that the site has a preliminary score that would allow for possible inclusion on the National Priorities List.

Additionally, in order to be an eligible brownfield site, the site must be placed on a list that is to be maintained by the state, that is updated at least annually, and that is made available to the public record.

There is an exception to this general prohibition of federal enforcement action at an eligible brownfield site. An enforcement action is specifically allowed when (1) a state requests that the EPA provide assistance in the performance of a response action; (2) a determination is made that contamination has or will migrate across state lines; (3) a determination is made that the release may present an imminent and substantial danger to public health, welfare or the environment; or, (4) after consultation with the state, the EPA determines that information concerning a prior cleanup was incomplete.

Prior to proceeding with an enforcement action at an eligible brownfield site, the federal government must notify the state and allow the state 48 hours to advise whether the release is or has been the subject of a cleanup conducted under a state remediation program, and whether the state has any plans to abate the release. The EPA may take immediate action after giving notification if any of the conditions described above have been met.

The EPA is also required to submit a report to Congress describing the basis for the enforcement action. The limitations on the EPA's ability to bring an enforcement action should provide developers and property owners with some comfort. However, this provision does not prevent a private party from bringing an action under CERCLA, nor would it prevent an enforcement action under other federal statutes.

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