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Federal Brownfields Law Provides Two Types of Liability Protection

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THE PASSAGE of New York's long-awaited Brownfields Cleanup Program in October 2003 has overshadowed, in New York, recent Environmental Protection Agency (EPA) guidances implementing its federal counterpart, the Small Business Liability Relief and Brownfields Revitalization Act (Act), Pub. L. No. 107-118, Jan. 11, 2002. This article will survey the legal background against which the Act operates, and outline the principal features of both titles of the Act, with reference to many new brownfields guidances from the EPA.

CERCLA and Brownfields

Brownfields law is essentially a body of limited exemptions from the far-ranging and often harsh imposition of liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, and its state counterparts. Brownfields laws have come into being as a result of the widespread recognition or perception that even mildly contaminated properties remain unmarketable because of the difficulty of financing development, which arises from fears that the developer of a site could be deemed liable for cleanup costs under CERCLA as an owner/operator of the site; this threat has long hindered such development.

Passed in 1980, CERCLA established governmental response authority and liability provisions aimed at rapid response to hazardous waste releases, and long-term remediation of sites significantly contaminated by hazardous wastes. The EPA is authorized to respond to a hazardous release, or threatened release, by entering onto the affected site and removing any hazardous material necessary to abate the threat. Long-term remediation of a site is pursued by listing it on the National Priorities List (whereupon the site becomes a "Superfund Site"), conducting a remedial investigation and feasibility study, adopting a remediation plan, and implementing that plan on the site.

Unless a private party agrees to conduct this remediation program, with government oversight, EPA will itself arrange for and conduct the remediation, using funds from the federal Superfund. This fund was created through specific taxes levied on industries historically responsible for hazardous waste generation and disposal.

To replenish the Superfund, CERCLA created a far-ranging and often harsh scheme of liability, under which all Potentially Responsible Parties (PRPs) are jointly and severally liable for all removal and remediation costs incurred by any state or federal governmental agency.

Prior to the passage of brownfields laws, PRPs included a broad range of parties with a connection to the site: all owners or operators of the site since the first deposit of hazardous waste, any generators of hazardous waste who arranged for disposal at the site, and any transporters that carried hazardous waste to the site. Until the Small Business Liability Relief title of the Act (SBLR title), there was a broad presumption as to the hazardous character of waste, so that virtually any waste coming from an industrial or municipal source was presumed to be hazardous; the SBLR title slightly narrows this presumption.

A PRP found liable for response and remediation costs has the right to seek "contribution" from other PRPs. As between themselves, PRPs may prove their "fair" allocation of response costs to a court, or in mediation, based on formulas that, at their most intricate, consider the so-called "Gore factors:" the quantity, toxicity, mobility, characteristics and age of a particular PRP's wastes, and the PRP's culpability and cooperation with enforcement efforts.

Because of the potential liability of a property's owner or operator, few developers have been willing to risk ownership of mildly contaminated or even ostensibly "remediated" sites, for fear of being designated a PRP in a subsequent cost-recovery or contribution action. Even less appealing is a site needing remediation, for which uncertain future remediation costs could be imposed on the developer alone.

As a result, currently and formerly contaminated "brownfield" sites — which are often close to labor, markets and transit — lie fallow, while developers, even of commercial and industrial facilities, search out so-called "greenfields," completely or relatively pristine properties, to which CERCLA liability cannot attach.

The Federal Statute

Industry and real estate development groups have long called for thorough reform of CERCLA's liability mechanisms. This movement has been resisted by environmental groups and others opposed to any weakening of CERCLA's "polluter pays" principal, who argue that even the innocent inheritors of polluting industries are best tapped to pay for the often severe damage of past practices. The resultant Act is a compromise to both.

The Act features two titles: (1) the Small Business Liability Relief title carved out backward-looking CERCLA liability protection for residential, de micromis, non-profit, and municipal solid waste contributors to hazardous waste sites. The Brownfields Revitalization title creates forward-looking liability protection for qualified owners of qualified brownfield sites.

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Its Small Business Title

The Small Business Liability Relief title of the Act exempts generators and transporters of waste from CERCLA liability where the waste contributed does not significantly add to the contamination under remediation, either because a party contributed so little waste as to comprise a de micromis contribution, or because the waste generated was typical household waste, i.e., municipal solid waste, and therefore presumptively not hazardous.

Exemption of De Micromis Contributors. Codifying EPA's practice, since a guidance memorandum of June 3, 1996, of not pursuing contributors of less than 110 gallons of liquid materials or 200 pounds of solid materials, the SBLR title exempts de micromis contributors of waste to a subject site. This exemption is found at the new CERCLA §107(o), 42 U.S.C. § 9607(o).

The limitations and recapture provisions starkly limit this exemption, however. Further, a de micromis contributor can be gathered back into the fold of PRPs if EPA finds that the contributor's waste, however little, could contribute significantly (even in the aggregate) to the cost of the response action, or that the contributor fails to comply with an information request or impedes a response action. For such a determination, EPA is not subject to judicial review.

Tempering the stern consequence of having to litigate oneself out of CERCLA liability, the burden of proving that the de micromis exemption does not apply to a particular defendant, in a private party contribution action, rests on the party seeking contribution. If the defendant is found exempt as a de micromis contributor, the party bringing the action is liable to the defendant for reasonable attorney's fees.

Municipal Solid Waste Exemption. By characterizing the type of waste typical of municipal solid waste (MSW), the new CERCLA §107(p), 42 U.S.C. §9607(p), exempts from response-cost liability owners, operators and lessees of residential property, and, generally speaking, 100-employee-or-fewer businesses and non-profit organizations, that generated MSW disposed of at the site. The Act provides further protection to residential owners, operators or lessees by barring private contribution actions against them.

Like the de micromis exemption, a party may not avail itself of the MSW exemption if EPA determines that its waste significantly increased response costs, or that the party has failed to comply with an information request, or has impeded a response action; also, such a determination is not judicially reviewable. The burden of proving the exemption criteria depends on the party bringing the action and the date of the waste's deposit.

Applicability of this exemption hinges on the characteristics of the waste in question, and the practitioner should refer to EPA's Aug. 20, 2003, guidance on the exemption's applicability, "Interim Guidance on the Municipal Solid Waste Exemption Under CERCLA §107(p)."[1] The touchstone is the relatively innocuous residential bag of garbage: industrial and commercial generators are eligible for the exemption upon a showing that their waste is essentially similar to household waste, was collected in the normal MSW rounds of collection, and contains no greater proportion of hazardous waste than the typical residential bag.

"Understanding the Federal Brownfields Law"

Facially, these exemptions respond to many of the intuitive objections to CERCLA's liability mechanism, namely the apparent unfairness of holding generators of little or no truly hazardous waste liable for potentially all of the response costs incurred on a site. However, these exemptions are carefully limited, and afford protection only to the archetypes of de micromis and MSW generators and transporters.

The Brownfields Revitalization title of the Act creates forward-looking liability limitations for qualified parties that own qualified sites, as follows.

Brownfields Title of the Act

Under this title, owners or operators of contaminated properties contiguous to sites on which a release occurred, and bona fide prospective purchasers of currently or formerly contaminated sites, are exempted from the "owner or operator" category of PRPs . This title also requires EPA to clarify the criteria of "all appropriate inquiry" necessary to qualify a site owner as an "innocent landowner." A party's membership in one of these categories removes the party from response-cost and contribution liability under CERCLA.

The Act adds a definition of "brownfield site" to CERCLA at §101(39), 42 U.S.C. §9601(39): "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." There follows a list of exceptions from this broad definition; these exceptions generally describe properties that are the subjects of active cleanup orders or listings under CERCLA and other federal and state hazardous or toxic waste statutes.

Qualified Parties

Parties entitled to liability protection as owners or operators of brownfields share several common elements, regardless of how they have come into site ownership, or the type of property involved. These common elements are discussed in a March 6, 2003, EPA guidance document titled "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ('Common Elements')."[2]

This guidance emphasizes the threshold criterion that a party must have performed "all appropriate inquiry" prior to acquiring a brownfield. The Act amends CERCLA §101(35), 42 U.S.C. §9601(35), to require EPA to promulgate standards and practices for satisfying the "all appropriate inquiry" criterion; this process is not yet complete. In the interim, §101(35) establishes that for properties acquired before May 31, 1997, appropriate inquiry involves prescribed considerations as a due-diligence inquiry into the condition of the property; for properties acquired after May 31, 1997, appropriate inquiry conforms to Standard E1527-97 of the American Society for Testing and Materials (ASTM), commonly known as a "Phase I Environmental Site Assessment."[3]

A second threshold criterion is that the party not be affiliated with a PRP. "Affiliation" is broadly defined, covering "direct and indirect familial relationships, as well as many contractual, corporate, and financial relationships."

The Guidance then sets out several continuing obligations. Under these, the party must: continue to comply with land use restrictions relied on or adopted as part of the remediation plan; take reasonable steps to stop continuing

releases and prevent future releases and exposure to past releases; provide assistance, access and cooperation to persons authorized to carry out a response action; comply with government requests for information; and provide any legally required notices regarding hazardous substances on the site.

Contiguous Property Owners. The Act creates CERCLA §107(q), 42 U.S.C. §9607(q), to exclude from liability owners of contaminated properties contiguous to the property on which a release of hazardous substances occurred.

To qualify, the landowner must prove by a preponderance of the evidence that she meets all of the "Common Elements," and one further showing: that she did not "cause, contribute, or consent to the release or threatened release" of hazardous substances. CERCLA §107(q). Note that while the "all appropriate inquiry" requirement of the common elements may disqualify a party from contiguous property owner exemption, by alerting her to hazardous substances on the property, the party could still pursue exemption as a Bona Fide Prospective Purchaser, with full knowledge of the contamination on site.

This exemption resolves, in many cases, one of the most striking distinctions between New York's Superfund program, Article 27, Title 13 of the Environmental Conservation Law (ECL), and CERCLA. As opposed to New York's designation of a site as the parcel of real property on which a release of hazardous waste actually occurred, (see ECL §§27-1301(2), 27-1305(1)(a)), CERCLA allows a designated site to encompass the boundaries of a plume of migrating hazardous material (CERCLA §101(9), 42 U.S.C. §9601(9)). Prior to the Act, therefore, liability could be imposed on the owner of a site contaminated solely by underground migration of hazardous material, on which no disposal or other "culpable" activity ever occurred. The contiguous property owner exemption now provides such property owners with protection they previously did not have.

EPA has issued an "Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners," dated Jan. 13, 2004,[4] which confirms this important development. After setting out important distinctions among the brownfields liability exemptions, the guidance notes EPA's belief that "contiguity" of property under this exemption includes properties contaminated by migration of wastes, even for properties not actually "next door" to the release site.

Bona Fide Prospective Purchasers. A bona fide prospective purchaser (BFPP) is defined by the Act, at CERCLA §101(40), 42 U.S.C. §9601(40), as a person who buys a contaminated property after Jan. 11, 2002, and establishes by a preponderance of the evidence that she meets all of the common elements discussed above, and that all waste disposal on the property predated her purchase. The Common Elements Guidance notes that BFPPs are the only parties who can conduct "all appropriate inquiry" and knowingly acquire contaminated property; for the other exemptions, "appropriate inquiry" would have shown a lack of contamination on the property. Note that appropriate inquiry may convert a prospective buyer from a potential "contiguous property owner" to a BFPP, with liability exemption available in either case.

Another consequence of the BFPP liability limitation is the decreased importance of the Prospective Purchaser Agreement (PPA), which, prior to the Act, was the only mechanism available to create, through negotiation with EPA, the kinds of liability limitations now available to BFPPs statutorily. An EPA guidance document acknowledges that, in most cases, PPAs are now obviated by CERCLA §107(r).[5] EPA may still enter into a PPA where a significant public interest may be advanced by the increased security of a PPA, or where the likelihood of a substantial windfall lien (see below) requires pre-purchase resolution of a buyer's liability exemption.

Windfall Liens and Bona Fide Prospective Purchasers. An important concern for BFPPs is the "windfall lien" provision under CERCLA §107(r), 42 U.S.C. §9607(r), under which EPA is provided with a lien on the property equivalent to the increase in fair market value of the property attributable to EPA's remediation of it, if EPA has unrecovered response costs.

EPA issued a Guidance document on July 16, 2003, "Interim Enforcement Discretion Policy Concerning 'Windfall Liens' Under Section 107(r) of CERCLA,"[6] describing when EPA may perfect windfall liens. Generally speaking, these situations suggest that EPA will perfect a windfall lien where the BFPP will realize an increase in the value of an industrial or commercial property, which increase is attributable to cleanup costs expended by EPA (not private parties), as opposed to mere assessment or investigation, and EPA is unlikely to recoup these costs through other means.

Innocent Landowners. Under CERCLA both before and after the Act, a property owner is exempt from "owner or operator" PRP status if the release of hazardous wastes on the owner's property resulted solely from the act or omission of a "third party" other than any person in a contractual relationship with the landowner, provided that the landowner took precautions against foreseeable acts or omissions of third parties and exercised due care with respect to the hazardous substance concerned.

Crucially, that contractual relationship includes the relationship of grantor/grantee of the property, so a previous owner cannot be the villainous third party of this exemption, unless the present landowner qualifies as an "innocent landowner" through his exercise of "all appropriate inquiry" with respect to the purchase of the property. The required standards of appropriate inquiry are those discussed in the Common Elements guidance, and which must now be clarified under the Act.

The Act dramatically expands the liability exemption attaching to the concept of "innocence," previously available only under this "innocent landowner" provision. Now, a prospective purchaser's "innocence" with respect to damaging waste disposal practices can be established through the evolving standards of appropriate inquiry discussed above, such that even with knowledge that a prior owner has contaminated the property, the prospective property owner can still qualify for liability exemption as a BFPP.

1. At http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-msw-exempt.pdf.

2. Located at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf. See also "'Common Elements' Guidance Reference Sheet," available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-ref.pdf. For indices of EPA's CERCLA-related guidance, see Policies & Guidance, Superfund Cleanup, at http://cfpub1.epa.gov/compliance/resources/policies/cleanup/superfund/.

3. An updated version of the ASTM Standard, E1527-00, has since 2000 superseded the E1527-97 standard, and has been in common use since its introduction.

4. At http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop.pdf. See also EPA's "Contiguous Property Owner Guidance Reference Sheet," Feb. 5, 2004, at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/contig-prop-faq.pdf.

5. See "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," May 31, 2002, at http://epa.gov/compliance/resources/policies/cleanup/superfund/bonf-pp-cercla-mem.pdf.

6. Located at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf; see also "Windfall Lien Guidance: Frequently Asked Questions," July 16, 2003, at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien-faq.pdf.