The Brownfields Amendments: New Opportunities, New Challenges—Part I

by Scott Reisch

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This two-part article describes important new amendments to the Comprehensive Environmental Response, Compensation, and Liability Act. The amendments alter the defenses to landowner and "generator" liability and make other changes intended to promote the cleanup and redevelopment of contaminated properties known as "brownfields."

In December 2001, after years of debate and delay, Congress unanimously passed the Small Business Liability Relief and Brownfields Revitalization Act[1] ("Amendments") as an amendment to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA").[2] The Amendments attempt to address two distinct problems that arise from CERCLA's draconian liability scheme. First, CERCLA has impeded the cleanup and reuse of contaminated properties known as "brownfields," and thereby contributed to development of "greenfields" (pristine undeveloped land) and urban sprawl. Second, CERCLA has had a devastating impact on many small businesses.

The Amendments address these problems through a combination of brownfields funding, liability reforms, and limitations on federal authority to require cleanups where a viable state program is already taking the lead. Although the Amendments' liability reforms are narrower and more complicated than one would hope, the additional funding and limitations on federal authority will likely further buttress Colorado's highly successful Voluntary Cleanup Program.[3] Ultimately, it may thereby achieve the brownfields revitalization that Congress has promised.

This article describes changes to CERCLA that will impact real estate transactions involving contaminated property, as well as new defenses available to small businesses caught in CERCLA's liability net. Part II of this article will describe the financial incentives Congress authorized in order to promote brownfields redevelopment.

Background

CERCLA imposes liability for "response costs" incurred in cleaning up contaminated property on four classes of "potentially responsible parties" ("PRPs"): (1) the current owner and operator of the contaminated property; (2) the owner and operator of the contaminated property at the time "hazardous substances" were disposed of at the property ("prior owner/operator"); (3) any person who "arranged for" the disposal or treatment of hazardous substances ("generator") at a property that is now contaminated; and (4) any person who transported hazardous substances to the contaminated property for treatment or disposal and selected the property as the destination.[4]

Landowner liability has made developers reluctant to acquire and redevelop contaminated property for fear that they will acquire perpetual, joint and several cleanup liability. Generator liability has resulted in thousands of small businesses being ensnared in litigation despite the fact that their wastes contained low concentrations of hazardous substances.

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Congress previously attempted to mitigate the harshness of CERCLA's liability regime by establishing the "third party" and "innocent landowner" defenses for landowners and by giving the U.S. Environmental Protection Agency ("EPA") authority to enter into expedited settlements with certain "*de minimis* landowners" and "*de minimis* generators" who contributed a small fraction of the waste at a site. Under the "third party defense," which dates back to CERCLA's enactment, an owner of contaminated property is not liable under CERCLA if it can prove three elements:

1. The contamination arises solely from the acts or omissions of a third party with whom the owner does not have a "contractual relationship."
2. The owner exercised "due care" with respect to the hazardous substances concerned.
3. The owner took "precautions" against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.[5]

In 1986, realizing that the "no contractual relationship" requirement left purchasers of contaminated property exposed to the full brunt of CERCLA liability, Congress amended the statute by adding a definition of "contractual relationship" that has become known as the "innocent landowner" defense. Under the defense, in addition to meeting conditions 2 and 3 above, a purchaser of contaminated property can avoid CERCLA liability if it can show that, prior to its purchase, any "disposal" of hazardous substances ceased and the purchaser conducted "all appropriate inquiry" and did not have any reason to believe that the property was contaminated.[6]

Owner/Operator Liability Reforms

The Amendments change CERCLA owner/operator liability in several important areas. They revise the innocent landowner defense, establish a contiguous property owner defense, and add a new "bona fide prospective purchaser" exemption and windfall lien. The following discussion addresses the key aspects of each of these reforms.

Changes to the Innocent Landowner Defense

The Amendments significantly revise the requirements for CERCLA's "innocent landowner" defense by adding additional conditions that must be met to claim the defense and by defining in more detail what constitutes "all appropriate inquiry." The new conditions for the innocent landowner defense include important post-acquisition obligations. Henceforth, to claim the defense, a party will need to show that it has provided "full cooperation, assistance and facility access to the persons authorized to conduct response actions at the facility," which includes allowing access to the site, presumably without compensation, for installing, operating, and maintaining remediation systems.[7] In addition, the party must comply with any land use restrictions and other institutional controls established or relied on in connection with the facility cleanup.[8] Under CERCLA, innocent landowners were already subject to the "due care" and "precautions" requirements outlined above. However, the leap from these somewhat nebulous requirements to a mandate of "full cooperation" and compliance with specific institutional controls is one that many parties may be unable to make.

Congress's definition of "all appropriate inquiry" will create new challenges for parties hoping to rely on the innocent landowner defense, although some of the changes provide welcome clarification. The new law provides that for transactions dated May 31, 1997, and later, compliance with ASTM Standard E-1527 for Phase I Environmental Site Assessments constitutes "all appropriate inquiry."[9] This largely confirms existing practice, but it may cause problems for some landowners who chose to skip the Phase I and proceeded directly to Phase II sampling.

For transactions before May 31, 1997, the Amendments provide that "all appropriate inquiry" requires consideration of four factors: (1) any specialized knowledge of the purchaser; (2) the relationship of the purchase price to the value of the property, if uncontaminated; (3) commonly known or reasonably ascertainable information about the property; and (4) the obviousness of the presence or likely presence of contamination, and the ability to detect the contamination by appropriate investigations.[10] These factors represent only a subset of what ASTM requires, and so may expand the range of parties who can obtain the protections of the defense.

Importantly, these definitions of "appropriate inquiry" only apply until the EPA promulgates regulations defining appropriate inquiry, which it must do by January 2004. The new regulations must require consideration of factors (1) through (4) above, as well as the following: the results of an inquiry by an environmental professional; interviews with past and present owners, operators, and occupants of the facility; reviews of historical sources, such as chain of title documents and aerial photos; searches for recorded environmental cleanup liens; reviews of government records; and visual inspection of the facility and adjoining properties.[11] These requirements are similar to those set forth in the ASTM Standard E-1527.

Unfortunately, these relatively straightforward changes are accompanied by other revisions that make the requirements for meeting the innocent landowner defense uncertain and potentially negate the value of the defense entirely. The Amendments mandate that EPA's new "appropriate inquiry" regulations require a party claiming the defense to show that it took "reasonable steps" to stop any continuing release; to prevent any threatened future release; and to prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substances.

These requirements potentially go well beyond both the due care and precautions requirements that apply under existing law, as well as the full cooperation and compliance requirements described above. Arguably, they require an innocent landowner to remediate the property to qualify for a defense for remediation liability. To avoid this absurd result, EPA's regulations will have to narrowly circumscribe what steps are "reasonable" for an innocent landowner to take with respect to pre-existing contamination.[12]

Contiguous Property Owner Defense

The Amendments establish a liability shield for a person whose property is contaminated by the migration of hazardous substances from another person's property.[13] However, this protection is limited to contiguous or "similarly situated" (for example, downgradient) property owners who meet the following eight requirements:

1. The owner did not cause or contribute to the release of hazardous substances.

2. The owner is not otherwise potentially liable, and is not affiliated (via certain contractual, familial, corporate, or financial relationships) with any person potentially liable, for response costs at a facility.

3. The owner has taken reasonable steps to stop any continuing release and to prevent any future exposures or releases, ex-

cept that in the case of groundwater contamination, groundwater investigations and remediation are not required.

4. The owner provides cooperation and access to authorized persons conducting response actions and natural resource restorations.

5. The owner complies with land use restrictions and does not impede institutional controls established or relied on in connection with the response action.

6. The owner complies with all EPA information requests and administrative subpoenas.

7. The owner provides legally required notices with respect to the discovery or release of hazardous substances at the facility.

8. At the time the property was acquired, the owner "conducted all appropriate inquiry" and "did not know or have a reason to know" that the property was or could be contaminated by a release from the other property.[14]

EPA will have its hands full as it tries to define the scope of the elements of the contiguous property owner defense. Even if EPA and the courts adopt flexible interpretations of these requirements, the contiguous property owner defense may be of little use to most clients. As outlined above, under current law, a landowner whose property is contaminated by an upgradient source already can rely on CERCLA's "third party defense" by establishing that it does not have a contractual relationship with its neighbor, and that it meets the due care and precautions requirements.[15]

Unlike the new contiguous property defense, the existing third party defense does not require due diligence prior to purchasing the contiguous property or extensive cooperation with EPA afterward. Indeed, whereas the contiguous property defense requires the owner to take steps to "stop any continuing release," there is clear authority that such steps are not required under existing law to qualify for the third party defense.[16] In practice, there may be few circumstances in which the contiguous property defense would be more attractive than the existing third party defense.

"Bona Fide *Prospective Purchaser" Exemption and Windfall Lien*

The Amendments add a new and potentially useful defense for "*bona fide* prospective purchasers" ("BFPP") who purchase or lease a property knowing that it is contaminated. An owner/operator qualifies as a BFPP and is exempt from CERCLA liability if it satisfies essentially the same requirements as are applicable to the contiguous property defense. However, the owner/operator does not need to show that it did not know or have reason to know that the property was contaminated. The BFPP exemption does not apply unless the property in question is acquired after January 11, 2002, and all disposal of hazardous substances occurred before the acquisition.[17]

Despite the BFPP exemption, the federal government is entitled to a lien on the property, or alternative assurance of payment, if it has expended unrecovered funds cleaning up the property, and the cleanup results in a windfall increase in the property's value.[18] The lien is limited to the amount of the increase in property value caused by cleanup and continues until the government collects its unrecovered response costs.[19]

Generator Liability Reforms

The Amendments include two exemptions that reduce CERCLA's burden on small businesses that may be liable as generators under that statute.[20] The "*de micromis* exemption" is based on the quantity or volume of waste sent to a contaminated facility, while the "municipal solid waste ("MSW") exemption" is based on the type of waste that is sent and the type of party sending it.

Under the *de micromis* exemption, a person cannot be liable as a generator or transporter if the total amount of material containing hazardous substances that the person sent or transported to the contaminated site was less than 110 gallons or 200 pounds, and all or part of the disposal, treatment, or transport occurred before April 1, 2001.[21] EPA may adjust the weight and volume cutoffs through regulation.[22]

Under the MSW exemption, a person otherwise liable as a generator is exempt if that person disposed of only MSW and can demonstrate that he or she generated the MSW and is: (1) an owner, operator, or lessee of residential property; (2) a "small business concern" that during the three taxable years preceding the date of notification of liability from EPA employed on average not more than 100 full-time individuals; or (3) a charitable tax-exempt organization that employed not more than 100 paid individuals.[23] The MSW exemption set forth in the Amendments is narrower than EPA's existing MSW settlement policy (that may or may not survive the Amendments), which has been available to MSW generators regardless of their size.[24] The Amendments define MSW as household waste and/or commercial, industrial, or institutional waste that is essentially the same as waste normally generated by a household.[25] Examples include office supplies, appliances, and food and yard wastes.

Both the *de micromis* and MSW exemptions apply only with respect to liability at sites listed on EPA's "National Priorities List" ("NPL"), which lists the approximately 1,200 sites that EPA has identified as most in need of cleanup. This creates an anomalous situation where parties are exempt from liability when their wastes are disposed of at the most contaminated sites in the country, but they retain liability when their wastes are disposed of at less contaminated sites. The NPL limitation is likely to be of growing importance, as the Amendments themselves impose new restrictions on NPL listings.[26]

Neither exemption applies if the materials sent to the NPL site contributed significantly to the cost of the cleanup or natural resource restoration of the site or if the party seeking the exemption fails to provide the requisite cooperation to EPA.[27] The *de micromis* exemption does not apply if the party claiming the exemption has been convicted of a criminal violation arising from conduct to which the exemption otherwise might apply.[28]

Finally, in all *de micromis* cases and where MSW was disposed of after April 1, 2001, the party seeking the exemption bears the burden of proof in any action brought by federal, state, or local governments.[29] However, in all *de micromis* cases and where MSW was disposed of before April 1, 2001, non-governmental plaintiffs bear the burden of demonstrating that the defendant does not fall within the exemption.[30] A non-governmental entity that commences an action for contribution against a party that qualifies for the MSW exemption is liable for the defendant's defense costs, including attorney fees and expert witness fees.[31] The burden of proof rules already are having a palpable effect on pending CERCLA cases where the absence of good records is an issue, and the burden of proof is therefore critical.

Changes to EPA's *De Minimis* Settlement Authority

The Amendments make several changes to EPA's existing authority to enter into expedited settlements with "*de minimis*" parties under CERCLA § 122(g). First, EPA now has authority to offer expedited *de minimis* settlements to parties that have a "limited ability to pay."[32] Second, absent a waiver from EPA, any party that obtains a *de minimis* settlement must, as a condition of settlement, waive its claims against other PRPs. Third, the Amendments make clear that *de minimis* settlers remain subject to EPA's information request authority, and that EPA can refuse to offer a *de minimis* settlement to any party that fails to comply with a request for information or access, or that impedes cleanup of the contaminated facility. Finally, EPA henceforth will be required to promptly determine whether a party is eligible for a *de minimis* settlement and provide written notification of its decision and reasons.[33]

Limitations on EPA Authority at State Lead Sites

The Amendments provide that at the request of a state, the U.S. President "generally shall" defer listing "eligible response sites" on the NPL if the President determines that: (1) the state, or another party under agreement with or order from the state, is conducting a response action at the site in compliance with a state cleanup program, and the response action will provide long-term protection of human health and the environment; or (2) the state is "actively pursuing an agreement [with a qualified party] to perform a response action" at the site.[34] The President may revisit the deferral decision after one year. If "reasonable progress" toward cleanup has not been made by that time, the President may add the site to the NPL.[35]

The Amendments also provide that the President may not take administrative or judicial action with respect to an "eligible response site" that is undergoing a state response action unless specific conditions are present.[36] Significantly, the Amendments specifically preserve the effect of any Memorandum of Agreement between EPA and a state regarding the state's voluntary cleanup program.[37] Colorado and EPA have such an agreement. Thus, in practice, the Amendments merely codify EPA's existing policy toward sites that are cleaned up under Colorado's Voluntary Cleanup and Redevelopment Act.[38]

Brownfields Funding

Perhaps the best news about the Amendments is that Congress has put greater financial muscle behind the cleanup of contaminated sites. The Amendments authorize the appropriation of $200 million per year for each of the next five years for grants to state and local governmental agencies for various brownfields initiatives, including site characterization, assessment, and remediation.[39] A full discussion of the new funding program, including the inevitable "strings" that will apply to those who receive the funding, will be provided in Part II of this article.

Conclusion

The success or failure of the Amendments ultimately will be judged by how well they facilitate the cleanup of brownfields sites, particularly by private parties. One of CERCLA's unintended—and, indeed, ironic—consequences has been the fact that businesses seeking to avoid

CERCLA liability have avoided previously used sites with redevelopment potential in favor of developing pristine "greenfield" sites. The result is at odds with conservation principles and contemporary notions of "smart" growth.

With the enactment of the Amendments, Congress claims to have removed significant barriers to the private cleanup and redevelopment of contaminated properties. The additional brownfields funding, which will be discussed in Part II of this article, may play a role in achieving Congress's aim. Ultimately, whether Congress's goal of revitalizing brownfields is fulfilled will depend in large part on how the courts and EPA—which expects to begin issuing guidance interpreting the Amendments in the summer of 2002—interpret Congress's work.

NOTES

1. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. 107-118; H.R. 2869 (to be codified at 42 U.S.C. §§ 9601, 9604, 9605, 9607, and 9622(g)). For the text of brownfields amendments and legislative history, *see* http://thomas.loc.gov and enter H.R. 2869.

2. 42 U.S.C. §§ 9601 *et seq*. Significantly, the Amendments do not restrict EPA's cleanup authority under other statutes, including the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq*.

3. CRS §§ 25-16-301 to -311.

4. 42 U.S.C. § 9607(a).

5. 42 U.S.C. § 9607(b).

6. 42 U.S.C. § 9601(35).

7. S*upra*, note 1 at Title II, § 223 (to be codified at 42 U.S.C. § 9601(35)(A)).

8. *Id.* (to be codified at 42 U.S.C. § 9601(35)).

9. Although the Amendments confirm the general understanding that a more limited review is considered "appropriate" in the context of a residential transaction, they require a "title search" to meet the "all appropriate inquiry" standard. This requirement may be problematic given that residential buyers typically buy title insurance without conducting a detailed search into prior owners of the site. *See supra*, note 1 at Title II, § 223 (to be codified at 42 U.S.C. § 9601(35)(B)(v)).

10. *Supra*, note 1 at Title II, § 223 (to be codified at 42 U.S.C. § 9601(35)(B)(iv)).

11. *Id.* (to be codified at 42 U.S.C. § 9601(35)(B)(iii)).

12. *Cf. State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2nd Cir. 1996) (rejecting as "counterintuitive" an interpretation that requires the defendant to incur response costs to qualify for the third party defense).

13. S*upra*, note 1 at Title II, § 221 (to be codified at 42 U.S.C. § 9607(q)).

14. *Id*. (to be codified at 42 U.S.C. § 9607(q)(1)(A)).

15. 42 U.S.C. § 9607(b); *see* EPA, *Guidance on Landowner Liability under Section 107(a)(1) of CERCLA,* De Minimis *Settlements Under Section 122(g)(1)(B) of CERCLA and Settlements with Prospective Purchasers of Contaminated Property* (June 6, 1989) at http://es.epa.gov/oeca/osre/890606.html (noting availability of third party defense for "contamination of property by adjacent landowners").

16. EPA, *Policy Toward Owners of Property Containing Contaminated Aquifers* (May 24, 1995) at http://www.epa.gov/R5Brownfields/htm/contaqui.htm ("[B]ased on EPA's interpretation of CERCLA, it is the Agency's position that where the release or threat of release was caused solely by an unrelated third party at a location off the landowner's property, the landowner is not required to take any affirmative steps to investigate or prevent the activities that gave rise to the original release in order to satisfy the 'due care' or 'precautions' elements of the Section 107(b)(3) defense." Given the breadth of this statement, it will be difficult for EPA to argue that a different analysis applies to contamination of media other than groundwater.).

17. S*upra*, note 1 at Title II, § 222(a) and (b) (to be codified at 42 U.S.C. §§ 9601(40)(A) and 9607(r)).

18. *Id.* at Title II, § 222(b) (to be codified at 42 U.S.C. § 9607(r)(2)).

19. *Id*. (to be codified at 42 U.S.C. § 9607(r)(4)).

20. *Id.* at Title I, § 102 (to be codified at 42 U.S.C. §§ 9607(o) and (p) and 9622(g)).

21. *Id*. (to be codified at 42 U.S.C. § 9607(o)(1)).

22. *Id.*

23. *Id*. (to be codified at 42 U.S.C. § 9607(p)(1)).

24. EPA, *Transmittal of Policy for Municipality and Municipal Solid Waste CERCLA Settlements at NPL Co-Disposal Sites* (Feb. 5, 1998) at http://es.epa.gov/oeca/osre/980205.pdf (allowing settlements for $5.30 per ton of MSW).

25. S*upra*, note 1 at Title I, § 102 (to be codified at 42 U.S.C. § 9607(p)(4)).

26. *Id.* at Title II, § 232 (to be codified at 42 U.S.C. § 9605(h)).

27. *Id.* at Title I, § 102(a) (to be codified at 42 U.S.C. § 9607(o)(2) and (p)(2)).

28. *Id.* (to be codified at 42 U.S.C. § 9607(o)(2)(B)).

29. *Id*. (to be codified at 42 U.S.C. § 9607(p)(5)(A)).

30. *Id*. (to be codified at 42 U.S.C. § 9607(p)(5)(B)).

31. *Id.* (to be codified at 42 U.S.C. § 9607(p)(7)).

32. *Id.* (to be codified at 42 U.S.C. § 9622(g)(7)); *cf.* EPA, *General Policy on Superfund Ability to Pay Determinations* (Sept. 30, 1997) at http://es.epa.gov/oeca/osre/970930-4.html.

33. *Id.* (to be codified at 42 U.S.C. § 9622(g)(9), (10)).

34. S*upra*, note 1 at Title II, § 232 (to be codified at 42 U.S.C. § 9605(h)(1)).

35. *Id*. (to be codified at 42 U.S.C. § 9605(h)(2)).

36. *Id*. (to be codified at 42 U.S.C. § 9628).

37. *Id*. (to be codified at 42 U.S.C. § 9628(b)(2)).

38. CRS §§ 25-16-301 to -311.

39. S*upra*, note 1 at Title II, § 211(a) and (b) (to be codified at 42 U.S.C. §§ 9601(39) and 9604(k)). ■

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