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NEW FEDERAL BROWNFIELD RELIEF LAW ENACTED: A SYNOPSIS

by Stan Millan and Mike Chernekoff

On December 20, 2001, both houses of Congress passed the Small Business Liability Relief and Brownfield Revitalization Act, HR 2869, 107th Congress, First Session. President Bush signed the new law on January 11, 2002.

In President Bush's words, the new federal law takes some of the "heavy-handedness" out of CERCLA/Superfund liability and encourages communities and businesses to "recycle" old, contaminated properties.

Currently Superfund/CERCLA imposes liability on certain parties for the costs to investigate and to clean-up a release or threatened release of a hazardous substance from a facility. Potentially responsible parties include current owners and operators of contaminated property; past owners and operators of contaminated property, if they were present when the disposal occurred; arrangers or generators of waste sent to contaminated properties; and transporters, if they selected the contaminated sites for disposal. Thus, developers and lenders have been reluctant to invest in what have been called "Brownfield" properties -- properties with historic known or suspected contamination -- for fear that they would become liable for cleanup costs associated with that property.

Brownfield Liability Relief

Bona fide Purchaser Protection

In an effort to encourage development of Brownfield properties, the new law exempts from CERCLA cleanup liability any "bona fide prospective purchaser" who purchased property after January 11, 2002, if the contamination occurred prior to his or her acquisition. The bona fide prospective purchaser may actually know of the contamination, acquire the property, and still not be assessed any liability or cleanup obligation.

Innocent Landowner Defense

The new law also continues the exemption from owner/operator liability of any innocent landowner, including an easement holder or tenant, and clarifies the standard of "all appropriate care" in which he or she must engage to establish a defense to CERCLA liability.

Under the new law, "all appropriate inquiry" for an "innocent landowner" is defined to mean, up to May 31, 1997, specialized knowledge or experience on the part of the buyer, the relation of the purchase price to the value of the property if it were not contaminated, commonly known or reasonably ascertainable information, obviousness of contamination, and ability to detect contamination by appropriate inspection. Thus, a formal environmental assessment is not necessarily needed to protect parties as innocent landowners for acquisitions prior to May 31, 1997. For acquisitions after May 31, 1997, purchasers must utilize the American Society for Testing Material (ASTM) 1997 version of Environmental Site Assessment standards (i.e., for Phase I site assessments) in their pre-purchase due diligence efforts. However, residential properties only require facility inspection and title research, if nothing adverse is found.

Contiguous Landowner

The new law also exempts from CERCLA liability a past or present owner or operator who has land contiguous to contaminated property and who did not participate in the contamination of his or her own property.

Under the new law these new innocent contiguous landowners, bona fide prospective purchasers, and innocent landowners must take reasonable care of the property while they own it. Thus, although they do not have to clean up the site, they would have to give notice to state agencies of any contamination, post signs and fences in contaminated areas and maintain any existing barrier to prevent contamination from escaping.

Other Liability Issues

Responsible parties who are liable to the government, but who can demonstrate they have an inability or limited ability to pay, may be entitled to a reduction in settlement. Additionally, EPA will not pursue a potentially responsible party who cleans up a site eligible for clean-up under an approved state response program. "De micromis" parties at 1,000-plus, National Priority List sites (the more contaminated or true Superfund sites) will now be exempt from arranger or transporter liability. Additionally, persons who were merely generators of municipal solid waste sent to National Priority List sites will no longer be liable for CERCLA response costs as arrangers regarding such sites.

Brownfield Funding

Finally, the new law establishes a fund for Brownfield development to replace EPA's administrative funding since 1999. Over $200 million annually will be available for grants and loans to public entities and non-profit institutions to plan, assess, inspect and clean up Brownfield sites. $50 million is also available for state response programs.

The basic thrust of the new law is that EPA will focus on the most contaminated sites around the nation, leaving to the states and private parties the responsibility to address lesser contaminated properties. There are only between 1,000 and 2,000 of legitimate actual or potential National Priority List sites around the nation, but potentially hundreds of thousands of Brownfield sites, regarding which federal interest will be reduced. These latter sites, with lesser contamination, fall within many of the protections of the new law.

Louisiana's Program

Differences exist between the federal revisions and the current Louisiana Remedial Action Law, a mini-Superfund law. Louisiana's program does not recognize the new "bona fide prospective purchaser" exemption to liability at this time. Legislation to amend the state program would be required for Louisiana law to mimic the federal program.

Louisiana law does include a voluntary clean-up program (VCP), which allows property owners to engage in a risk assessment and risk-based clean-up and to be awarded a certificate of completion which would exempt that owner, and future owners, from state mini-Superfund liability. Louisiana's VCP also allows innocent parties to enter into a "partial" remediation agreement with LDEQ. Under such agreements, the property owner can be awarded a certificate and exemption from Louisiana mini-Superfund liability for it and its successors after addressing contamination only within the boundaries of the property and only to risk-based levels consistent with the development plans for the property. Enforceable use restrictions may be required. Now, with the enactment of the new federal law, EPA will not pursue CERCLA liability against persons who clean up properties under VCP agreements.

Jones, Walker is assisting clients at several such sites under the state law and, in January 2002, has obtained for one client the first LDEQ-issued certificate of completion under the Louisiana VCP for a partial clean-up of a commercial site. We are happy to answer any questions you may have regarding the new federal law or the existing state VCP program. For further information, please contact Mike Chernekoff or Stan Millan (in the New Orleans office); Andrew Harrison or Rob Scheffy (in the Baton Rouge office).

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding this E*Zine and this practice, please contact:*

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