

January 2002

Environmental News

New Legislation Changes Potential Liability for Contaminated Properties

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New Superfund Amendments

On January 11, 2002 President Bush signed the “Brownfields Revitalization and Environmental Restoration Act of 2001”. The Act expands and clarifies exemptions from liability under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) for innocent landowners and creates a program to finance Brownfield redevelopment.

For the first time, the Act clearly exempts from liability innocent landowners whose property becomes contaminated by the migration of hazardous substances from neighboring properties. Furthermore, the Act makes the existing liability exemption for bonafide prospective purchasers a practical reality by clarifying definitions and due diligence standards.

Implications of the New Legislation for Deals Involving Contaminated Property

The amendments have several implications for mergers, acquisitions, and financing arrangements:

- > **Due Diligence:** Since the innocent landowner exclusions are conditioned upon appropriate inquiry and the amendments clarify the standards for appropriate inquiry, it is now more important than ever the buyers conduct a Phase I environmental site assessment according to the American Society for Testing Materials (ASTM) standards. Purchasers should not rely on past assessments or solely on reviews of public documents but should commission a new, complete Phase I to take full advantage of the new liability exclusions.

- > **Clean Up:** Purchasers should be aware that to take full advantage of the liability exclusions they must, once the purchase is complete, prevent any continuing releases they might discover and prevent exposure to hazardous substances. Addressing these emergency conditions may require purchasers to make expenditures up front and seek recovery from former owners or operators.
- > **Indemnification:** Purchasers should not view the new liability exclusions as a substitute for indemnification by sellers. The exclusions are helpful but rest on specific conditions and are untested. They are analogous to the secured creditor exclusions from CERCLA liability enacted in 1996. Lenders have not reduced their demand for indemnification subsequent to the 1996 amendments and neither should purchasers subsequent to this amendment.
- > **Funding:** The Brownfields funding mechanism in the amendments could create a source of low cost financing for site assessment and remediation for owners and operators of contaminated sites and prospective developers. The amendments include petroleum contaminated sites in the definition of Brownfields increasing the number of potential sites that could be funded through this mechanism. Like many government funded programs, however, those wishing to take advantage of this funding must be completely familiar with the program's requirements, once they are developed. Furthermore, funding may not be available for some time as Congress must first appropriate funds and the Environmental Protection Agency (EPA) and local governments must develop programs for their distribution.

Summary of the Act

Contiguous Landowner

Previously, CERCLA did not directly address the liability status of owners or operators of otherwise clean property that was contaminated by the migration of hazardous substances from a neighboring property. Under the new amendments, owners or operators of property contaminated by a neighboring property are exempt from CERCLA liability for remediation of that contamination.

Prospective Purchaser

This CERCLA exemption has existed for some time but was vague and therefore ineffective as a practical matter. The statute clarifies the definition of prospective purchaser and the bounds of the exemption. Those who purchase contaminated sites after the date of enactment of the statute are exempt from CERCLA liability for past contamination that they did not cause or to which they did not contribute. If the United States has incurred response costs at the facility, the EPA may impose a lien for those costs on the facility but only in an amount sufficient to recover its response costs and not to exceed the amount by which its response actions have increased the fair market value of the property. The prospective purchaser may negotiate with the EPA to assign the lien to another property owned by the purchaser or provide another form of financial assurance acceptable to the EPA. The lien remains on the property until satisfied or until the EPA recovers all response costs.

Conditions of Exemptions

Both of the exemptions have several key conditions. Under these conditions, innocent landowners must:

- > Not cause, contribute, or consent to a release or threatened release of contaminants;
- > Not be affiliated or have any other business or familial relationship with the owner or operator of the source of contamination. For purposes of the contiguous landowner exemption, business relationships for the purchase and sale of goods and services are excluded. For the purposes of the prospective purchaser exemption, the contractual relationship leading to the sale of the property is excluded.
- > Take reasonable steps to stop any continuing release, prevent any future release, and prevent or limit potential exposure to hazardous substances on their property. This does not require the contiguous landowner to conduct groundwater investigations or monitoring if the contamination enters their property through groundwater migration;
- > Fully cooperate with all response actions and other remedial activities;
- > Comply with all land use restrictions or institutional controls on their property designed to address the contamination;
- > Comply with all requests for information or subpoenas issued under CERCLA;
- > Provide all notices to regulatory authorities required under CERCLA;

- > Conduct appropriate inquiry before purchasing the property (see below). In the case of a contiguous landowner, not know or have reason to know that the land was or could be contaminated.

Appropriate Inquiry

Prior to these amendments, CERCLA had a general standard for judging whether innocent landowners had undertaken appropriate inquiry. Courts were to take into account any specialized knowledge or experience on the part of the landowner, the relationship of the purchase price to the value of the property if uncontaminated, commonly known or reasonably ascertainable information about the property, the obviousness of the contamination, and the ability to detect the contamination through appropriate inspection. The vagueness of this standard led courts to rule that if purchasers did not find contamination before purchase that was later discovered, it probably did not look hard enough.

The new amendments include a more detailed standard for appropriate inquiry:

- > Within two years of enactment, EPA must develop standards and practices for conducting appropriate inquiry under the Act;
- > For purchases that occurred after May 31, 1997 and will occur before EPA develops standards and practices, environmental inquiries that follow ASTM Standard E11527-97 for Phase I environmental site assessments will satisfy the appropriate inquiry standard.
- > For purchases that occurred before May 31, 1997 the old, vague standards remain in place.

In addition to the conditions above, the amendments also add to the definition of appropriate inquiry that the purchaser must take all reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit any exposure to hazardous substances.

Brownfields Financing

The amendments establish a financing program authorized at \$200 million per year for assessing and remediating abandoned hazardous waste sites in cities. The funds are to be distributed to local governments that can use them to assess and characterize site contamination or make grants or loans for remediation costs to site owners and operators or developers. No funds have yet been appropriated under the program but in the past fiscal year, Congress appropriated \$98 million to EPA for Brownfields restoration and the Bush administration has announced that it will seek what amounts to full funding for Fiscal Year 2003.

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If you have any questions regarding any of the material contained in this newsletter, please feel free to call Mr. Otis or Mr. Mulligan at Curtis' New York head office at 212.696.6000.

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