

## **CERCLA Amended To Limit Liability, Stimulate Brownfields Redevelopment**

By [Pillsbury Winthrop Shaw Pittman LLP](#)

President Bush recently signed into law the Small Business Liability Relief and Brownfields Revitalization Act, the first substantial set of amendments to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund) in years.

The amendments are complex and cover many aspects of the Superfund program. Among the most significant changes are new provisions limiting liability for "innocent landowners," "bona fide prospective purchasers" and "contiguous property owners." The amendments also aim to encourage redevelopment of "brownfields" – commercial or industrial properties where contamination and potential CERCLA liability hinder development – by providing federal funding to states with voluntary site cleanup programs.

### **Innocent Landowner Defense Clarified**

Prior to these amendments, the innocent landowner defense – available to owners that did not know and had no reason to know of contamination upon acquisition – was so narrow that courts rarely accepted it. The amendments clarify with new detail that to be an innocent owner one must carry out "all appropriate inquiries" prior to acquisition and take "reasonable steps" to stop any new or continuing release.

As to the "all appropriate inquiries" requirement, the U.S. Environmental Protection Agency (EPA) is to promulgate detailed regulations by January 11, 2004. Until then, the amendments codify the use of an American Society for Testing and Materials standard (ASTM Standard E1527-97, "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process") for property purchased on or after May 31, 1997. For sites purchased prior to that date, courts must evaluate liability on a case-by-case basis guided by general statutory criteria. As to "reasonable steps," EPA may (but is not required to) issue guidance. Unless and until it does so, this new term is open to interpretation by the courts.

### **Bona Fide Prospective Purchasers Protected**

Prior to the amendments, persons acquiring previously contaminated property, but who did not qualify as innocent landowners, were liable for cleanup of contamination regardless of the extent of their knowledge or care. To facilitate the sale and development of brownfields and similar property that is still suited for commercial or industrial use, the amendments establish standards of inquiry

and conduct that may shield from such liability a purchaser who took ownership after January 11, 2002. To qualify, the owner must establish, among other things, that it made appropriate inquiries into the previous ownership and uses of the facility and took reasonable steps to stop any new or continuing releases.

If a landowner successfully establishes that it was a bona fide prospective purchaser, it will not be liable for any cleanup or remediation of the property. However, if EPA incurs unrecovered response costs at a facility for which an owner is not liable because of this exemption, and the fair market value of the remediated property exceeds its value prior to cleanup, EPA may impose a "windfall" lien on the facility for those costs.

### **Exemption Created For Contiguous Property Owners**

Previously, a property owner could be liable under CERCLA for owning property contaminated by a hazardous substance released from a neighboring site owned by someone else. Under the new contiguous property owner exemption, a property owner who, among other things, conducted all appropriate inquiries when acquiring the property, did not know or have reason to know that the property was contaminated, and has taken reasonable steps to stop any new or continuing releases of hazardous substances will not be liable as an owner or operator. Although reasonable steps are required, a contiguous landowner need not conduct groundwater investigations or remediation if a hazardous substance enters groundwater beneath that landowner's property solely as a result of subsurface migration in an aquifer. (This provision codifies EPA's July 3, 1995 policy concerning owners of property overlying contaminated aquifers.)

EPA may issue an "assurance" that no enforcement action will be initiated against the owner and may grant protection against cost recovery or contribution claims. An owner who cannot qualify for this exemption, because of knowledge of the contamination at time of acquisition, may still qualify as a bona fide prospective purchaser.

### **De Micromis Exemption Adopted**

Another exemption introduced by the amendments is the "de micromis" exemption, which eliminates liability for cleanup response costs and contribution actions to entities that contribute less than 110 gallons of liquid materials or less than 200 pounds of solid materials to a site. However, EPA may use its discretion to hold the contributor liable if the small contribution has had an overwhelmingly toxic effect that significantly contributes to cleanup costs.

### **Grants May Be Provided To Fund Brownfields Redevelopment**

In order to aid brownfields redevelopment, the amendments make federal grants available to states with voluntary cleanup programs that include a process for verifying and certifying that sites have been cleaned up to the appropriate state standard. Once a property receives state certification, its owner is no longer subject to enforcement actions or cost recovery claims initiated by EPA for past releases. Currently, about forty states have voluntary cleanup programs granting certification to sites that, although contaminated, have been cleaned up to suitable levels. With federal funds now

available for such programs, more states may develop voluntary cleanup programs, more sites may be listed as brownfields, and more brownfields may be available for future development.

### **CERCLA Continues To Present Difficulties**

The amendments overlap substantially, but not always clearly, with the prior provisions of the complex CERCLA scheme. Additionally, overlap among the standards and limitations within the amendments themselves may also complicate their interpretation. Until EPA issues guidance or there is judicial interpretation regarding the new standards and limitations, application of CERCLA will continue to be challenging.