

**SUMMARY OF THE SMALL BUSINESS LIABILITY RELIEF
AND BROWNFIELDS REVITALIZATION ACT OF 2001**

Karl S. Bourdeau
Beveridge & Diamond, P.C.
Washington, D.C.

I. Introduction

In the waning hours of its 2001 session, Congress enacted the Small Business Liability Relief and Brownfields Revitalization Act (H.R. 2869/Public Law 107-118). A product of the legislation passed by the House in May 2001 to provide small business Superfund liability relief (H.R. 1831), and the Senate in April 2001 to encourage redevelopment of contaminated properties (S.350), the statute is designed to accomplish two principal objectives: (1) promotion of brownfields redevelopment through federal funding, liability relief, and assistance in development of state voluntary cleanup programs, and (2) relief from liability at Superfund National Priority List (“NPL”) sites for certain *de micromis* generators and transporters and generators of municipal solid waste.

Signed into law by President Bush on January 11, the statute should impact significantly both the landscape of brownfields redevelopment deals and Superfund contribution litigation involving “minor” parties. While properly hailed as one of the more important pieces of federal environmental legislation in some time, the new law nonetheless presents certain interpretative challenges and embodies limitations that may hamper the range of its utility, especially insofar as its liability relief provisions are concerned.

Interpretation of the law may be aided in certain respects by the relevant Senate and House Committee reports. See Sen. Rep. 107-2, 107th Cong., 1st Sess. (March 12, 2001); H.R. Rep. 107-70, 107th Cong., 1st Sess. (May 21, 2001), Parts 1 and 2. However, given the manner of the legislation’s passage, there is no Conference Committee report and only very limited floor debate. Except as expressly indicated below, the following summary of the statute’s key provisions does not reflect consideration of the act’s legislative history.

II. Brownfields Revitalization Provisions

The brownfields redevelopment incentive package includes the following key provisions:

- federal grants to certain governmental entities and, in limited cases involving remediation, grants or loans to nonprofit organizations or for-profit entities for inventorying, characterizing, assessing, remediating, and planning related to “brownfield” sites (broadly defined, with a number of important exceptions, to encompass 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);

- a conditional exemption from CERCLA liability (but not from liability under other federal or state laws) for certain owners of real property contiguous to property not owned by such persons at which there has been a release or threatened release of a hazardous substance;
- an exemption from CERCLA liability (but not from liability under other federal or state laws) for “innocent purchasers” who, among other conditions, (i) conducted “all appropriate inquiries” (as statutorily defined in different ways depending upon the purchase date and whether residential or commercial property is involved) into the presence of contamination at the property prior to purchase, and (ii) take “reasonable steps” to address releases of hazardous substances at or from the property purchased;
- a conditional exemption from CERCLA liability (but not from liability under other federal or state laws) for “bona fide purchasers” who, among other things, acquire ownership after enactment of this law, are not affiliated with other parties at the property being purchased, and take “appropriate care” through “reasonable steps” to address threats from releases of hazardous substances at or from property they acquire (unlike prior law, this exemption provides relief for parties who take title with knowledge of existing contamination);
- creation of a federal lien for the United States for unrecovered response costs in cases where the owner of the property is not liable by virtue of this legislation and the property’s fair market value is increased by federal response actions above that which existed before such actions were taken;
- authorization to EPA to award grants to states or Indian tribes for development of response programs to address contaminated property that are comprised of certain elements, including (i) the survey and inventory of brownfields sites, (ii) public participation opportunities regarding site cleanups, (iii) oversight and enforcement authorities and resources to ensure that response actions will be completed, protective, and in compliance with applicable law, and (iv) “cleanup plan approval” and “certification of response action completion” mechanisms (these grants may also be used for capitalizing revolving loan funds for brownfields remediation or purchasing insurance for financing response actions under state response programs);
- restriction of EPA’s administrative and enforcement authority under CERCLA to order response action or recover response costs regarding the “specific release” that is addressed by a response action at an “eligible response site” conducted by others “in compliance with the State program that specifically governs response actions for the protection of public health and the environment”; these enforcement limitations apply only in states that maintain and publicize a record of sites at which response actions were completed in the previous year (including information on any institutional controls at those sites) or are to be addressed in the upcoming year, and only to “response actions

conducted after February 15, 2001” (notably, however, Congress established no other criteria for the content of state programs for purposes of this liability relief (including those criteria referenced above for purposes of federal financial assistance to state programs)); and

- authorization for EPA to nonetheless use the aforementioned enforcement authorities in limited cases involving (i) a request by a state for federal assistance, (ii) migration of contamination across state lines or onto federal property, and – perhaps most significantly – (iii) sites where (1) “after taking into consideration the response activities already undertaken”, EPA determines that “a release or threatened release may present an imminent and substantial endangerment to public health or welfare, or the environment, and additional response actions are likely to be necessary to address, prevent, limit or mitigate the release or threatened release”, or (2) EPA determines that new information has been discovered after the earlier of the date on which cleanup was approved or completed that indicates that further remediation is required.

While these provisions should provide meaningful incentives to spur brownfield redevelopment, their effectiveness may be limited by, among other things, the following:

- for purposes of the federal financial assistance provisions of the act, the term “brownfields sites” does not extend to many sites of “federal interest”, including, among other categories of sites, (i) CERCLA removal action, administrative order or settlement, or proposed or final NPL sites, (ii) RCRA permit or administrative order sites, (iii) RCRA corrective action sites for which a permit or order has been issued to require “implementation of corrective measures”, (iv) PCB sites subject to remediation under TSCA, and (v) many petroleum contamination sites (although financial assistance may be awarded for such sites on a case-by-case basis upon certain findings);
- the “bona fide purchaser” and “contiguous property owner” liability exclusions are conditioned on, among several other things, the person involved not being “potentially liable, or affiliated with a person that is potentially liable, for response costs at a facility through any direct or indirect” relationship (emphasis supplied); the use of the term “a facility” (rather than “the facility” involved) suggests that the owner of a particular site might not qualify for a liability exclusion if it is potentially liable for response costs at any other facility; however, such a reading, while plausible given the use of the term “the facility” elsewhere in these provisions, would seem to undermine what appears to be Congressional intent, especially in light of the legislative history of those provisions (which does use the term “the facility”);
- the precise steps that an owner will need to take to address contamination at its property upon discovery of it in order to qualify for any of these three liability exemptions is likely to remain unclear for some time and will continue to present some uncertainty for those involved in brownfields transactions; presumably, however, cleanup of eligible sites

under state response programs should enable property owners to avoid CERCLA liability - but not liability under other federal or state laws - except in unusual circumstances where EPA might choose to exercise its residual CERCLA or other federal authorities;

- although federal financial assistance for development of state response programs is not conditioned upon an express EPA approval of the adequacy of such programs, it is likely that EPA will develop more fulsome criteria for the provision of such grants; depending upon how these criteria are framed, some states may need to amend their programs to qualify for such assistance;
- although the “finality” provisions designed to forestall federal order or cost recovery action at sites cleaned up under state response programs are not limited to sites addressed under state programs that qualify for federal assistance, they are limited in a number of very important ways: (i) they only apply to CERCLA order and cost recovery authorities, and not other federal or state authorities; (ii) they only apply to “eligible response sites”, which exclude, except on a case-by-case basis, certain important categories of sites (e.g., RCRA corrective action sites); and (iii) the reservation of EPA’s authority to use its “imminent and substantial endangerment” authority under Section 106(a) of CERCLA, while circumscribed somewhat by the statutory language, leaves some uncertainty regarding possible future federal action (despite repeated EPA protestations, before Congress and elsewhere, that the Agency has never used such authority at sites being cleaned up in compliance with state response programs); in any event, because the enforcement bar extends only to the “specific release” being addressed under the state program, there will be an incentive to conduct thorough site investigation prior to cleanup in order to strengthen the “assurances” provided by the bar; and
- the regulations that EPA is statutorily required to adopt in two years to establish standards for “appropriate inquiry” will certainly have a substantial impact on the manner in which environmental due diligence is conducted for real estate transactions (until those regulations are adopted, “appropriate inquiry” - for property purchased after May 31, 1997 - consists of the ASTM Phase I assessment procedures); at this stage, however, significant uncertainty exists as to the nature and stringency (and, therefore, cost and duration) of the due diligence approach EPA will adopt consistent with the statutorily prescribed criteria.

As a result of these provisions, future contaminated property transactions will assuredly involve additional considerations. For example, purchasers will want to establish a reliable record that can be used to ensure that disposal occurred entirely pre-acquisition and may attempt to strengthen representations from sellers regarding pre-acquisition disposal and release of hazardous substances. Sellers may balk at such broader representations and seek to negotiate purchase price increases or other covenants regarding the purchaser’s cleanup and subsequent property use activities. Purchasers will also undoubtedly closely scrutinize the cleanup and other actions they must take to qualify for the bona fide purchaser exemption, and the applicability of,

and possible exceptions to, the federal enforcement bar in the event a liability exemption is questionable or unavailable.

III. Small Business Superfund Liability Relief and Other CERCLA Provisions

The legislation contains the following principal liability relief sections designed to assist small businesses and other potentially responsible parties escape both CERCLA liability and the costs of defending themselves against certain contribution actions associated with such potential liability:

- De Micromis Exemption
 - Any party, regardless of size, is exempt from generator and transporter liability for response costs (but not natural resource damages) at NPL (but not other) sites if it can demonstrate that the total amount of material containing hazardous substances that it contributed to a site was less than 110 gallons of liquids or less than 200 pounds of solids, provided that all or part of the disposal, treatment or transport occurred before April 1, 2001
 - The exemption does not apply if:
 - (i) the materials could contribute significantly to the cost of response action or natural resource restoration; or
 - (ii) the person has failed to comply with a CERCLA information request or administrative subpoena, or has impeded response action or resource restoration at the site; or
 - (iii) the person has been criminally convicted for the conduct to which the exemption would apply
 - The burden of proof is on a nongovernmental contribution plaintiff to demonstrate that the conditions for the exemption are not met
 - For actions commenced after the date of enactment (January 11, 2002), nongovernmental contribution plaintiffs (but apparently not nongovernmental cost recovery plaintiffs properly bringing an action under Section 107 of CERCLA) are liable for the defense costs (including reasonable attorneys and expert witness fees) of defendants found not liable for contribution based on this exemption

- Municipal Solid Waste Exemption
 - Any party is exempt from generator liability for response costs (but not natural resource damages) at NPL (but not other) sites if it can demonstrate that it disposed of only “municipal solid waste” (“MSW”) (as defined in the statute), without regard to when disposal occurred, and that it is:
 - (i) a person that owns, operates, or leases residential property from which all the MSW in question was generated (a “residential party”); or
 - (ii) a business entity that employed on average, during the three taxable years preceding notification of potential CERCLA liability, not more than 100 full-time individuals, or the equivalent thereof, and a “small business concern” (within the meaning of the Small Business Act) “from which was generated all of the [MSW] attributed to the entity with respect to the facility” involved; or
 - (iii) a tax-exempt 501(c)(3) organization that employed not more than 100 paid individuals during the taxable year preceding notification of potential CERCLA liability at the location at which the MSW attributed to it was generated.
 - Unlike with the *de micromis* exemption, the MSW exemption does not extend to transporter liability and does not extend to municipalities themselves.
 - The exemption does not apply if:
 - (i) the MSW could contribute significantly to the cost of response action or natural resource restoration; or
 - (ii) the person has failed to comply with a CERCLA information request or administrative subpoena, or has impeded response action or resource restoration at the site (note that the third circumstance invalidating the *de micromis* exemption - certain criminal convictions - does not apply in the case of the MSW exemption)
 - No contribution action may be brought at all by any nongovernmental party against a residential party
 - With respect to contribution actions against small business entities and nonprofit organizations, the burden of proof is on a nongovernmental contribution or cost recovery plaintiff (with respect to MSW disposed of on or after April 1, 2001) or on any contribution or cost recovery plaintiff (with respect to MSW disposed of

before April 1, 2001) to demonstrate that the conditions for the exemption have not been met

- Nongovernmental contribution plaintiffs are liable for the defense costs of a defendant that successfully invokes this exemption in the same manner as set forth above in the case of the *de micromis* exemption
- Impact on EPA Settlement Authority
 - the legislative history indicates that neither the MSW nor the *de micromis* exemption is intended to affect EPA's existing settlement authority or policies with respect to parties ineligible for the act's exemptions
 - consequently, EPA's *de micromis* and MSW settlement policies should remain in force for non-eligible parties at both NPL and non-NPL sites

In addition to the liability relief provisions discussed above, the legislation:

- essentially codifies, with some conditions, EPA's "ability-to-pay" settlement authority; in doing so, the statute, among other things,
 - (i) provides that EPA is to take into account "the ability of the person to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the person and demonstrable constraints on the ability of the person to raise revenues";
 - (ii) requires ability-to-pay settlors to waive their contribution rights absent extenuating circumstances; and
 - (iii) eliminates judicial review of any EPA ability-to-pay determinations
- provides that the *de micromis* and MSW liability exemption and ability-to-pay provisions shall not apply to or in any way affect "any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State, before the date of enactment"
- establishes conditions for deferral of final listings of eligible NPL sites to state voluntary cleanup programs.

The *de micromis* and MSW liability exemption provisions should significantly impact ongoing and future CERCLA contribution actions. In particular, the burden-shifting and attorneys/expert witness fee payment provisions should cause current private contribution

plaintiffs to reassess the viability of extant claims and should give future plaintiffs pause before asserting claims to which the exemptions may apply. (Enhanced pre-litigation investigation may be necessary to determine whether potential defendants meet the statutory exemption criteria.) For its part, the NPL-listing deferral provisions should provide states and potentially responsible parties willing to conduct timely response actions at a site under state response programs a valuable tool to forestall NPL listings in many circumstances.

IV. Future CERCLA Legislative Reform

With passage of this law, Congress chose to amend only those elements of CERCLA concerning which there was broad consensus. More comprehensive statutory reform is not currently expected, although various issues posed by EPA's response to the September 11 terrorist acts, among other things, may provide impetus for further targeted reforms.

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Questions regarding the Small Business Liability Relief and Brownfields Revitalization Act of 2001 may be referred to Karl Bourdeau at (202) 789-6019 or kbourdeau@bdlaw.com.

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