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Liability Relief Under the Brownfield Amendments—The Continuing Story

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Liability Relief Under the Brownfield Amendments—The Continuing Story

The Small Business Liability Relief and the Brownfields Revitalization Act of 2002 (Brownfield Amendments)

- Potential for federal CERCLA liability relief
- Hurdles to qualify for the relief before the acquisition of the property
- Long-term commitments to maintain the relief
- State law liability issues must be considered

Who Can Qualify For Liability Relief?

The Brownfield Amendments can impact the federal CERCLA liability of 3 categories of property owners:

1. Innocent purchasers
2. Contiguous property owners
3. Bona fide prospective purchasers

* ...provided that the property owner meets the **statutory criteria** (which will be analyzed on a fact-specific basis)

STATUTORY CRITERIA: *the three classes of purchasers must meet certain criteria in order to qualify for the liability exemptions*

Innocent Purchasers



STATUTORY CRITERIA:

- make all appropriate inquiries to establish that he had no reason to know of the hazardous substances
- provide “full cooperation assistance and facility access” to the person authorized to conduct response actions at the facility
- comply with land use restrictions and not impede the effectiveness or integrity of institutional controls
- take reasonable steps to stop any continuing releases, prevent threatened future releases and prevent or limit human, environmental, or natural resources exposure

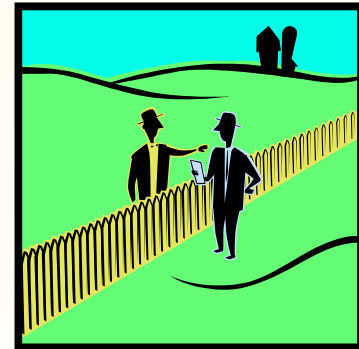


Contiguous Property Owners

- “contiguous to or otherwise similarly situated”

STATUTORY CRITERIA:

- at the time the person acquired the property he/she conducted all appropriate inquiry and did not have reason to know the property was or could be contaminated
- the person did not cause, contribute or consent to the release
- the person or entity is not affiliated with any person who is liable for the release or is not the result of a reorganization of a potentially liable entity
- the person takes reasonable steps to stop any continuing release, prevent future releases and prevent or limit human, environmental, or natural resources harm



Contiguous Property Owners



- the person provides full cooperation with persons authorized to conduct response actions
- the person is in compliance with any land use restrictions and does not impede any institutional controls
- the person is in compliance with any request for information or administrative subpoena issued by the EPA
- the person provides all legally required notices with respect to the discovery of hazardous substances

Bona Fide Prospective Purchasers



“Bona Fide Prospective Purchaser”: a person, or tenant of that person, who acquires ownership of a facility after the date of enactment of the Brownfields Amendments, January 11, 2002, and by a preponderance of the evidence, establishes:

- all appropriate inquiry into previous ownership and uses of the facility made before acquiring the property
- disposal at the facility occurred prior to acquisition
- the person provides all legally required notices with respect to hazardous substances found at the facility
- the person exercises “appropriate care” with respect to the hazardous substances found at the facility by taking “reasonable steps” to (a) stop any continuing releases (b) prevent any threatened future releases (c) prevent or limit human, environmental or natural resource exposure to any previously released hazardous substance

Bona Fide Prospective Purchasers

- the person provides full cooperation and access to the facility to those authorized to conduct response
- the person is in compliance with any land use restrictions and does not impede the effectiveness or integrity of any institutional control
- the person complies with any information request or administrative subpoena under CERCLA
- the person is not potentially liable for response costs at the facility or “affiliated” with any such person through (a) direct or indirect familial relationship or (b) any contractual, corporate, or financial relationship



How Does One Meet the Qualifying Criteria?



- Evaluation of compliance performed on a “careful, fact-specific analysis”
- Statutory Criteria for compliance:
 - A. “All Appropriate Inquiry” Criteria
 - B. Full Cooperation
 - C. Compliance with Land Use Restrictions and Institutional Controls
 - D. Did Not Cause, Contribute or Consent to a Release/Disposal Occurred Prior to Acquisition
 - E. Compliance with All Requests for Information
 - F. All Legally Required Notices
 - G. No Affiliation with a Potential Liable Party
 - H. Reasonable Steps

42 U.S.C. § 9601(35)(B)(iii)

Criteria For Compliance – All Appropriate Inquiry

Statute requires EPA to promulgate regulations and consider several factors in developing the regulations

- Results of the inquiry of an environmental professional
- Interview with past and present owners, operators and occupant regarding the potential for contamination
- Review of historical sources
- Searches for recorded environmental clean-up liens
- Reviews of federal, state and local records
- Visual inspections for the facility and adjoining properties
- Relationship of the purchase price to the value of the property if not contaminated
- Commonly known or reasonably ascertainable information about the property
- The degree of obviousness of the presence or likely presence of contamination and the ability to detect contamination by appropriate investigation

Criteria For Compliance – All Appropriate Inquiry

- EPA instituted a negotiated rulemaking to develop All Appropriate Inquiry regulations.
- The Federal Advisory Committee represented a variety of interests
- Consensus draft in November 2003
- Proposed Regulations published August 26, 2004 69 Fed. Reg. 52,542
- All Appropriate Inquiry must be conducted prior to acquiring the property

Criteria For Compliance

- All Appropriate Inquiry is just the **beginning** of compliance



Criteria For Compliance: Full Cooperation



- Applicable to all three potential limitations on liability
- Requires the property owner to provide full cooperation and assistance to persons authorized to conduct response actions or natural resources restoration
- Includes providing access necessary for the installation, operation, and maintenance of any response action
- Providing such access could result in the disruption of certain operations on-site
- Access requirements can impact future use of the property and re-sale

Criteria For Compliance: Compliance with Land Use Restrictions and Institutional Controls

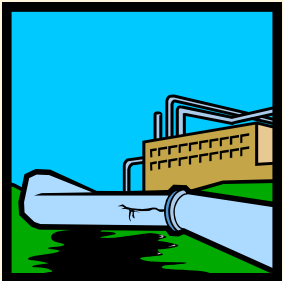
- Applicable to all three potential liability limitations
- Applies to legal and physical restrictions on property
 - Institutional controls
 - Activity and use limitations
 - Land use controls
- Important to understand restrictions and their impact on future use of the property
- Compliance with the land use restrictions even if the restrictions have not been properly implemented through the use of an enforceable institutional control
- The National Conference of Commissioners of Uniform State Laws (NCCUSL) has prepared a model Uniform Environmental Covenants Act (UECA) which provides a systematic approach to recording the environmental covenants and protecting the integrity of the covenant once recorded



Criteria For Compliance: Did Not Cause, Contribute or Consent to a Release/Disposal Occurred Prior to Acquisition

- Contiguous Landowner exemption: “did not cause, contribute or consent to a release”
- BFPP exemption: “disposal occurred prior to acquisition”

CERCLA defines **release** as “any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injection escaping, leaching, dumping, or disposing into the environment.”



CERCLA defines **disposal**, as “the discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or onto any land or water so that such solid or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters including groundwater

Criteria For Compliance: Did Not Cause, Contribute or Consent to a Release/Disposal Occurred Prior to Acquisition

- Cases decided before the enactment of the Brownsfields Amendments have split on whether passive migration is disposal
- Statutory language requiring the bona fide prospective purchaser to stop any future releases supports the argument Congress meant active disposal
- EPA has stated in guidance that it does not believe that Congress intended to impose a burden on bona fide prospective purchasers to remove contaminated soil or extract groundwater. *Common Elements Guidance*.
- Results not clear, especially in jurisdictions that previously have held that passive migration constitutes disposal under CERCLA.

Criteria For Compliance: Compliance With All Requests For Information

- Criterion applies to both the contiguous property owners and the bona fide prospective purchaser liability relief provisions
- Requires compliance with all requests for information issued by the President under CERCLA
- Is it just for the subject property?
- What about standard defenses?
- Who will have responsibility for responding to the request?



Criteria For Compliance: All Legally Required Notices

- Criterion applies to both the contiguous property owner and the Bona Fide Prospective Purchaser
- Requires that one provide all legally required notices under federal, state and local laws
- Includes release of substances and presence of UST

Criteria For Compliance: No Affiliation With A Potential Liable Party

- Criterion appears in both the contiguous property owner and Bona Fide Prospective Purchaser potential exemptions
- “Affiliated with” is not defined in the statute
- Prevent transactions structured to avoid liability



Criteria For Compliance: Reasonable Steps

- Stop continuing releases
- Prevent future releases
- Prevent or limit human, environmental or natural resource exposure to previously released substances



Important Points to Remember Regarding the Limits of the Liability

1. Specified time frames

- i.e. the All Appropriate Inquiry must be completed before ownership is acquired
- ongoing obligations



2. Liability protections under State Law Programs

- both state and federal criteria must be met within the constraints of the deal.



3. Site specific basis