

## ENVIRONMENTAL REPORT

# Federal amendments to Superfund law offer protection

PURCHASERS CAN SHIELD THEMSELVES

by James D. Brusslan

**O**n Jan. 11, President George W. Bush signed legislation that protects knowing purchasers of contaminated property from environmental liability. The new legislation narrows the sweeping reach of Superfund.

## Guest Columnist

As prospective purchasers will have fewer concerns about liability, the Act encourages productive development of contaminated property. This article discusses the Small Business Liability Relief and Brownfields Revitalization Act, and how prospective purchasers can shield themselves from Superfund liability.

### Superfund and land owners

It is well known that an owner of contaminated land may be held responsible under federal law for an entire cleanup, whether or not it owned the property during disposal. Although Superfund includes an "innocent landowner" defense, few owners meet its onerous standards. As a result, environmental issues have bogged down many real estate transactions. Often prospective purchasers simply have walked away from contaminated property. The presence of contamination has also delayed transactions pending remediation or resulted in protracted price negotiations.

### The new bona fide prospective purchaser defense

The Act creates a new "bona fide prospective purchaser" (BFP) defense under Superfund (known as CERCLA). An owner may qualify as a BFP whether or not it knew, or should have known, of the contamination before the purchase. An owner can avoid CERCLA liability by establishing the following relatively minimal elements:

1. *Disposal Must Have Taken Place Before Ownership*—All disposal of hazardous substances must have occurred before the BFP acquired the property.

2. *BFP Must Make Environmental Inquiries Before the Purchase*—Prior to purchasing the property, the owner must make environmental inquiries. The Act directs the U.S. EPA to promulgate regulations outlining the scope of the inquiry within two years. Until then, assessments must comply with American Society for Testing and Materials (ASTM) standards, which most professional engineers already employ.

It may seem odd that Congress requires a BFP to assess a site's contamination when an owner's knowledge is irrelevant to the BFP defense. The purpose of the inquiry undoubtedly is to identify any emergency situations requiring immediate remediation.

3. *BFP Must Report Discovery of Contamination as Required By Law*—The BFP must provide all legally required notices of its discovery of contamination. As a practical matter, in many cases, notification of the presence of contamination is not required.

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4. *BFP Must Exercise Appropriate Care*—The BFP must exercise "appropriate care" to stop or prevent any continuing releases or exposure. As Congress did not define "appropriate care," courts may have to construe the term. It is doubtful that courts will interpret "appropriate care" to impose a comprehensive site remediation. A broad interpretation would, in effect, eviscerate the BFP defense by imposing a substantial cleanup obligation upon the prospective purchaser. Instead, "appropriate care" most likely requires a purchaser to undertake basic steps to protect public health. In Chicago, where groundwater is not used for drinking supplies, the appropriate care element is less burdensome than other areas where drinking water may be impacted.

5. *BFP Must Cooperate, Assist and Provide Information and Access*—The BFP must provide access to persons authorized to clean the site and furnish EPA with any requested information. Other CERCLA provisions impose similar obligations, so this element does not increase the burden on the BFP.

6. *BFP Must Comply With Institutional Controls To Prevent Contamination*—The BFP must also abide by land restrictions. For instance, if a restrictive covenant limits the land's use to industrial, the BFP may not convert it to residential. Once again, this element merely restates other laws requiring compliance with institutional controls.

The BFP may not be affiliated with any party who is otherwise liable under Superfund. For example, the BFP may not be a subsidiary of a waste generator or a liable land owner.

7. *The EPA's Lien for Previous Government Remediation*—The Act provides the United States with a property lien for any of the government's unrecovered remediation costs that have increased the property's value. Assume that EPA had performed a remediation action before the BFP's purchase, which increased the site's value by \$200,000. EPA would have a \$200,000 lien

on the property. A prospective purchaser can determine EPA's involvement, if any, through a simple Freedom of Information Act request.

### Other important provisions

The new Act also protects owners from Superfund liability for contamination that has migrated onto their properties from others. Although EPA has a policy against prosecuting migration cases, the new Act provides a statutory defense. Additionally, the Act protects very small generators of hazardous substances and clarifies the innocent landowner defense. The Act also establishes funding and programs to encourage government and nonprofit brownfields projects. Finally, the Act protects entities that have successfully completed a certified state remediation program. In Illinois, once an owner obtains a state "no further remediation" letter, it need not be concerned about federal prosecution.

### Encouraging brownfield development

The Small Business Liability Relief and Brownfields Revitalization Act lifts an enormous impediment. By satisfying relatively few requirements, a purchaser can protect itself from federal enforcement, which could result in substantial cleanup costs. Although the Illinois legislature has not implemented a parallel amendment to state law, the Illinois version of Superfund is based on proportionate share liability, which already protects prospective purchasers from significant exposure. As new owners will have fewer liability concerns under CERCLA, the Act should decrease transaction costs and encourage real estate development.

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