



President Bush Says Changes in Superfund Liability will Accelerate Brownfield Redevelopment

Saying it would "encourage the cleanup and redevelopment of old industrial properties," President George Bush signed the "Small Business Liability Relief and Brownfields Revitalization Act" on January 11, 2002.

The President noted that State voluntary cleanup programs¹ had been hindered by the lack of liability protection in Superfund and said the new law would provide increased protection to prospective purchasers, owners of property next to contaminated sites and landowners not responsible for contamination of their property.

Here are the major provisions of the new Act:

Federal "hands off" policy

Some environmental lawyers have been concerned about the potential for incurring Superfund liability even though a property has been cleaned up under a State program. While there has been no reported instance where USEPA actually has "overfiled" at such a site, the new legislation bars USEPA from bringing an enforcement action at a State Brownfield site unless:

- Requested to do so by the state;
- Contamination migrates across state lines;
- The cleanup was inadequate;
- New information shows the need for more work.

The "innocent landowner" defense

Under the original 1980 version of Superfund, a buyer could avoid liability by demonstrating that there was no reason to suspect that contamination was present based upon "all appropriate inquiry into previous ownership and uses," even if contamination were discovered later on. This so-called "innocent landowner defense" became the basis for the system of environmental due dili-

gence that has been conducted ever since in most commercial real estate transactions. While the statute did not create a standard for this defense, the term has come to be defined as a Phase I Environmental Assessment under standards established by ASTM.² The new Act retains the innocent landowner defense but adds a requirement that the owner take "reasonable steps" to prevent or limit contamination.

More significantly, the Act mandates USEPA to establish new *regulations* to define what constitutes "all appropriate inquiry" by 2004. In the meantime, the ASTM standards apply.

Bona fide prospective purchasers

For *prospective* purchasers who wish to shield themselves from Superfund liability, the Act requires a demonstration that:

- The buyer has conducted "all appropriate inquiry" into previous ownership and uses.
- Existing contamination occurred prior to the purchase.
- Legally required notices of a release have been made.
- Site access and cooperation is granted to response contractors.
- There is compliance with institutional controls (e.g., deed restrictions, engineered barriers).
- The new owner exercises "appropriate care" to stop or prevent further contamination.
- There is no affiliation with any party liable for a release.

Prospective purchaser agreements are now negotiated under USEPA guidelines. The new Act provides a statutory defense without the necessity of a formal agreement.

¹ For a description of the Illinois EPA's site remediation program see *The Carlson Report*, "The No Further Remediation Letter: Clean Hands, Clean Land," October 2000 and "Beyond the NFR: Issues and Opinions," November 2000.

² ASTM is the American Society for Testing and Materials. See *The Carlson Report*, "ASTM 1527-00: Update and Improved Phase I Standards," December 2000.

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What is “appropriate care”?

Chicago attorney James Brusslan points out that the requirement to take “appropriate care” may be troublesome. A recent report by the Congressional Research Service concludes “If a landowner guesses incorrectly” about what steps to take, “his or her liability exemption disappears.” USEPA is working on new guidance to clarify this issue.

Relief for contiguous property owners

The Act also aims to protect existing property owners from Superfund liability if contamination migrates onto their land from neighboring sites. Although USEPA now has a policy of not enforcing against property owners in these situations, the new law provides a statutory defense.

To qualify for this protection, however, an owner must not have caused or contributed to the contamination. The owner also must have conducted “all appropriate inquiry” into environmental conditions (e.g., environmental assessment) before purchasing the property. The results of that inquiry must have shown that no problems were present at that time.

In addition, the contiguous owner must not be “affiliated” with their neighbor through family, contractual, or financial relationships and must cooperate fully with and provide access to the parties doing a cleanup.

Indirect liability exposure?

Currently, contamination that migrates to contiguous property is the responsibility of the source, both as a matter of USEPA policy and case law.³ In an attempt to make this a statutory protection, Congress may have exposed adjacent property owners to strict liability according to attorney Harvey Sheldon of Hinshaw & Culbertson. For the first time, the law requires that contiguous owners “undertake certain duties” to qualify for this protection. “The new provision requires an affirmative defense,” he says. “This is a defense that is conditioned on the owner’s ability to prove he satisfies the new statutory conditions. This is a tough burden.”

Attorney Ray Reott feels that the changes are well intended and give parties new arguments in lawsuits based upon liability. “Ultimately, it’s up to the courts,” he says. We are advising clients to be somewhat cautious until these rules are litigated and we know how they will be applied. In the past, the courts have tended to keep people

on the hook, rather than let them off.”

Expanded definition of “Brownfield”

The Act expands the kind of property eligible for “Brownfield” grant and tax credits, and it will greatly increase grant funds available once monies are appropriated. Grants are available to help investigate and clean-up sites deemed important to local economies, and private developers may seek to have local governments apply for a site that they propose to develop.

The new definition of “Brownfield” is quite broad. Generally, a property is eligible for consideration as a “Brownfield” if it is real property, “the expansion, redevelopment, or reuse of which may be complicated by the presence of a hazardous substance, pollutant, or contaminant.”

Exclusions from the definition of “Brownfield” include sites that are on the National Priorities List or under active Federal enforcement; those undergoing RCRA corrective action, and sites with PCB releases being cleaned up under the Toxic Substances Control Act.

Attorney Jennifer Nijman of Winston & Strawn likes the expanded grant program that will be channeled through local governments, but says it may be limited in its impact. “USEPA is required to develop a ranking scheme for grant applications,” according to Nijman, “which will consider factors like the potential to stimulate economic growth or benefit low income communities,” she says. “The resulting system may not fit the priorities of local developers. In addition, they may not have the time or patience to work through the paperwork requirements.”

In summary

“I think the new law is helpful,” says Rich Carlson, President of Carlson Environmental. “The trend in public policy has been to loosen the strict liability standard and this Act continues that trend. There is less fear of liability now than there was in the early days of Superfund. The new Act should help facilitate deals.”

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³ Unless the condition is made worse by the contiguous owner.