



The 2002 CERCLA Amendments

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New Defenses

- ◆ Limited To CERCLA Liability
- ◆ Do Not Apply to
 - RCRA 7003 Injunctive Action
 - RCRA Corrective Action
 - RCRA Citizens Suits
 - State Actions



Changes to Innocent Purchaser Defense

- ◆ Must Satisfy New Pre-Acquisition Due Diligence Standards
- ◆ Imposes Post-Acquisition Obligations
 - Cooperate and Provide Access for Persons Performing Response Actions
 - Comply With Land Use Controls (LUCs)
 - Provide Access to Persons Maintaining LUCs

Bona Fide Prospective Purchaser Defense

- ◆ Applies to transactions after January 11, 2002
- ◆ Applies to Purchasers and Tenants
- ◆ Applies to brownfield and NPL sites





Elements of BFP Defense

- ◆ Disposal took place prior to acquisition
- ◆ Conducted “Appropriate Inquiry”
- ◆ Complied with Reporting Requirements
- ◆ Undertakes “Appropriate Care”
- ◆ Cooperate and Provide Access to Persons Performing Response Actions
- ◆ Comply With LUCs



BFP Defense Elements cont'd

- ◆ Provide Access for Persons Maintaining LUCs
- ◆ Comply with EPA CERCLA Information Requests or Subpoenas
- ◆ Not PRP or affiliated with PRP by:
 - direct or indirect familial relationship
 - contractual or corporate relationship
 - Corporate Reorganization



Windfall Lien

- ◆ EPA performs cleanup
- ◆ Increases Market Value of Property
- ◆ Arises When Cleanup Costs Incurred and Continues Until Lien Satisfied by Sale or EPA Recovers Costs
- ◆ BFP May Grant Lien on Other Property or Provide Other Assurances




Contiguous Property Owner Defense

- ◆ Owner did not cause, contribute, or consent to release
- ◆ Conduct “Appropriate Inquiry”
- ◆ Exercise “Appropriate Care”
- ◆ Cooperate and Provide Access To Persons Performing Cleanups
- ◆ Comply With LUCs
- ◆ Provide Access To Persons Maintaining LUCs



Contiguous Property Owner cont'd

- ◆ Comply with all release reporting requirements
- ◆ Comply with EPA CERCLA Information Requests and Subpoenas
- ◆ Owner not a PRP or affiliated with PRP



New Due Diligence Requirements

- ◆ Commercial property
 - Old CERCLA factors for purchased before May 31, 1997
 - ASTM E1527 for property purchased after May 31, 1997
 - EPA must issue due diligence guidance by 2004
- ◆ Transaction Screen Not Sufficient



Due Diligence Standards Cont'd

- ◆ Non-Governmental or Non-Commercial Purchasers of Residential Property
 - Site Inspection
 - Title Search



De Micromis Exemption

- ◆ Generated or Transported Prior to April 1, 2001:
 - 100 gallons of liquid wastes
 - 200 pounds of solid wastes
 - Equivalent to 0.001% policy cutoff
- ◆ Contribution plaintiffs must establish exemption does not apply



DMPRP Exemption cont'd

- ◆ Exemption does not apply if:
 - Wastes significantly contributed or could contribute to response action or NRD
 - Failed to respond to information request
 - Impede response action
 - Convicted of crime relating to the conduct for which exemption sought
- ◆ EPA exemption withdrawal not reviewable



Municipal Solid Waste Exemption

- ◆ Certain generators of MSW prior to April 1, 2001:
 - Waste generated by household
 - commercial, industrial, or institutional waste
 - essentially the same as household waste
 - collected and disposed with other MSW as part of normal MSW collection services
- ◆ Does not apply to municipal sludge or municipalities that owned or operated co-disposal facilities



MSW Exemption cont'd

- ◆ Applies to owner, operator, or lessee of residential property that generated MSW
- ◆ Business generating MSW if:
 - 100 or fewer workers for 3 tax years preceding PRP notice
 - Qualifies as small business concern under Small Business Act
- ◆ non-profit organizations if:
 - 100 or fewer workers for 3 tax years preceding PRP Notice
 - All MSW attributable to the organization
- ◆ Does Not apply to transporters



MSW Exemption cont'd

- ◆ Exemption does not apply if:
 - Wastes significantly contributed or could contribute to response action or NRD
 - Failed to respond to information request
 - Impede response action
 - Convicted of crime relating to the conduct for which exemption sought
- ◆ EPA exemption withdrawal not reviewable
- ◆ Unsuccessful plaintiffs liable for reasonable fees including attorneys fees



Eligible Brownfield Sites

- ◆ Brownfield is a site where
 - Expansion, redevelopment or reuse complicated by
 - Presence or potential presence of a hazardous substance, pollutant, or contaminant (e.g. ACM, LBP)
- ◆ Excluded Sites
 - Planned or ongoing removal action under CERCLA
 - Included or proposed to included on NPL



Excluded Sites cont'd

- ◆ Subject to a CERCLA section 106 order, AOC or consent decree
- ◆ Permit under RCRA, CWA, TSCA or SDWA
- ◆ Corrective action under RCRA permit or 3008(h)
- ◆ Subject to RCRA closure
- ◆ Release of PCBs subject to remediation under TSCA



Excluded Sites cont'd

- ◆ Subject to the control of federal government except land held in trust for Indian tribe
- ◆ A response action has been funded from federal LUST Trust Fund



Deferral of NPL Sites

- ◆ EPA may defer listing eligible brownfield site for up to one year if:
 - State or a private party performing cleanup under qualified State Response Program
 - State is actively pursuing VCP agreement with person state believes is capable of conducting response action



NPL Deferral cont'd

- ◆ EPA may decline to defer or discontinue deferral if:
 - State is as an owner, operator or a significant contributor of hazardous substances at the site
 - Determines NCP criteria for issuance of a health advisory exists, or
 - other conditions for deferral are no longer met



State Response Program

- ◆ Eligible State Response Program may share in \$50M
- ◆ Federal Enforcement Bar for cleanups approved under Eligible State Response Program
- ◆ State must either have MOA with EPA or satisfy following conditions:



Elements of State Response Program

- ◆ Inventory of state brownfield sites
- ◆ Adequate oversight and enforcement authorities to ensure protective cleanups
- ◆ Adequate resources to complete cleanups and ensure effectiveness of LUCs
- ◆ Mechanisms and resources for meaningful opportunities for public participation
- ◆ Mechanisms for final cleanup approvals



Federal Enforcement Bar

- ◆ Applies to statutory and administrative brownfield sites
- ◆ Limited to federal CERCLA actions and not apply to private contribution actions
- ◆ Excluded Sites
 - NPL sites or sites proposed for listing
 - Sites that pose a threat to a sole-source drinking water aquifer or a sensitive ecosystem
 - petroleum-contaminated sites



Enforcement Bar cont'd

- ◆ EPA may bring enforcement action against volunteer if:
 - State requests EPA assistance
 - EPA determines that contamination has or will migrate across a state line and further response actions are necessary
 - Contamination has or will migrate onto property controlled by the federal government that will impact authorized use
 - The release poses an imminent and substantial endangerment despite response action
 - New information indicates further remediation is necessary



Enforcement Bar

- ◆ EPA must notify state at least 48 hours before taking action
- ◆ State has 48 hours to notify EPA if action has been taken or is planned
- ◆ EPA may take immediate action if one of the exceptions apply