**Congress Enacts Sweeping Amendments to CERCLA: Is the Wicked Witch Dead?**

By Larry Schnapf

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act.[i] The law is most first sweeping changes to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") since the 1986 Superfund Amendments and Reauthorization Act. The new legislation provides immunity from CERCLA liability for prospective purchasers of contaminated property, property owners whose land is contaminated from hazardous substances migrating from a contiguous property and for landowners who remediate property under a qualifying state cleanup program. It also creates a brownfield grant program that may be used by local governments and non-profits organizations to developing brownfield sites. The law also provides financial assistance to states to help establish and administer brownfield or voluntary cleanup programs. Finally, the law codifies certain EPA policies providing liability relief to certain kinds of CERCLA generators.

## I. Brownfields Revitalization and Environmental Restoration Act

Title II of the legislation is called the Brownfields Revitalization and Environmental Restoration Act (the "Brownfield Amendments").[ii] This title clarifies and establishes new defenses and exemptions to CERCLA liability as well as a number of incentives that are designed to promote the reuse and development of brownfield sites.

### A. New Obligations for the Innocent Purchaser

To invoke the "innocent purchaser's defense, an owner must establish by a preponderance of the evidence that it did not know and had no reason to know that any hazardous substances were disposed of at the facility.[iii] To establish that it had no reason to know of the contamination, a defendant must demonstrate that it took "*all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability.*" In determining whether there was an "appropriate inquiry," CERCLA requires that any specialized knowledge or experience of the innocent owner must be taken into account as well as the relationship of the purchase price to the contaminated property and whether the presence of contamination was obvious or could be detected by an appropriate site inspection.[iv]

Prior to the enactment of the Brownfield Amendments, an owner qualifying as an innocent purchaser had to comply with the due care and precautionary requirements of the third party defense.[v] The Brownfield Amendments add the following new obligations that an owner purchaser must comply with *after acquiring the property* to preserve its status as an innocent purchaser.

- Cooperate, assist, and provide access to persons that are authorized to conduct response actions or natural resource restoration at the property.[vi]

- Comply with any land use restrictions established or relied on in connection with the response action at a vessel or facility and must not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action, and.
- Provide access to persons authorized to conduct response actions at the facility to operate, maintain or otherwise ensure the integrity of land use controls that may be a part of a response action. [vii]

**B. New Due Diligence Standards**

One of the criticisms of CERCLA had been that it did not create standards for what constituted an "appropriate inquiry." The Brownfield Amendments establish interim standards for satisfying this requirement. EPA is directed to promulgate permanent standards by January 11, 2004.[viii]

For commercial property purchased before May 31, 1997, the Brownfield Amendments provide that courts shall take the following factors into account when determining if a defendant/owner conducted an appropriate inquiry:

- Any specialized knowledge or experience on the part of the defendant;
- The relationship of the purchase price to the value of the property, if the property was not contaminated;
- Commonly known or reasonably ascertainable information about the property;
- The obviousness of the presence or likely presence of contamination at the property; and
- The ability of the defendant to detect the contamination by appropriate inspection. [ix]

For property purchased on or after May 31, 1997 and until EPA promulgates its due diligence standards, owners or tenants may satisfy the appropriate inquiry requirement by performing a Phase I environmental site assessment in accordance with the American Society for Testing and Materials "E1527 Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process. [x]

As part of this interim standard, the purchaser must also exercise "*appropriate care*" with respect to hazardous substances found at the facility by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.[xi]

The Brownfield Amendments create a more relaxed standard of due diligence for non-governmental or non-commercial purchasers of residential property or similar use. These purchasers may qualify as an innocent purchaser or Bona fide prospective purchaser by conducting a site inspection and title search that reveal no basis for further investigation.[xii]

In promulgating permanent due diligence standards, EPA is required to include the following criteria in its standard.

- The results of an inquiry by an environmental professional.
- Interviews with past and present owners, operators, and occupants of the

facility for the purpose of gathering information about potential for contamination at the facility.

- Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records to determine previous uses and occupancies of the real property since the property was first developed.
- Searches for recorded environmental liens.
- Reviews of federal, state and local government environmental records.
- Visual inspections of the facility and of adjoining properties.
- Specialized knowledge or experience of the defendant.
- The relationship of the purchase price to the value of the property in an uncontaminated state.
- Commonly known or reasonably ascertainable information about the property,
- The degree of obviousness of the presence or likely presence of contamination at the property, and
- The ability to detect the contamination by appropriate investigation.

### C. The Bona Fide Prospective Purchaser Defense

Perhaps the principal drawback of the CERCLA innocent purchaser defense has been that for a landowner to successfully assert the defense, it had to establish that it had no reason to know that the property was contaminated. Since the problem with brownfields is the existence or suspicion of contamination, the defense was largely unavailable to prospective developers or tenants of brownfield sites.

To eliminate this obstacle to redevelopment of brownfields, the Brownfield Amendments created a new Bona Fide Prospective Purchaser ("BFP") defense.[xiii] The BFP defense applies to property that qualifies as a "brownfield site" as well as NPL sites.

Under the new defense, landowners or tenants who knowingly acquire or lease contaminated property after January 11, 2002 can avoid CERCLA liability if they can establish the following conditions by a preponderance of the evidence that:[xiv]

- All disposal of hazardous substances occurred before the purchaser acquired the facility.[xv]
- The purchaser conducted an "appropriate inquiry" (see above)[xvi]
- The purchaser complied with all release reporting requirements.[xvii]
- The purchaser took "*appropriate care*" by taking by taking reasonable steps to stop any continuing release, prevent any threatened future release; and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.[xviii]
- The purchaser cooperates, assists, and provides access to persons that are authorized to conduct response actions or natural resource restoration at the property. [xix]
- The purchaser complies with any land use restrictions established as part of response action and does not impede the effectiveness or integrity of any

institutional control used at the site.[xx]

- The purchaser must also provide access to persons authorized to conduct response actions to operate, maintain or otherwise ensure the integrity of land use controls at the site.[xxi]
- The purchaser complies with any EPA request for information or administrative subpoena issued under CERCLA.[xxii]
- The purchaser must establish that it is not a PRP or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP.[xxiii]

### D. EPA Windfall Lien Authority For BFP

While a BFP is immune from CERCLA liability, Congress wanted to make sure that the owner did not unduly profit at the taxpayers expense. As a result, the Brownfield Amendments create a windfall lien in favor of EPA for property owned by BFPs. [xxiv] To impose a windfall lien, EPA must establish that it has performed a response action, has not recovered its response costs and that the response action increased the fair market value of the property above the fair market value of the facility that existed before the response action was initiated.[xxv] The windfall lien is to be measured by the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property. The lien will arise at the time EPA incurs its costs and shall continue until the lien is satisfied by sale or other means, or EPA recovers all of its response costs incurred at the property.[xxvi]

In lieu of EPA imposing a windfall lien on the property, the BFP may agree to grant EPA a lien on any other property that the BFP owns or provide some other assurance of payment in the amount of the unrecovered response costs that is satisfactory to EPA.[xxvii]

### E. Clarification of the Liability of Owners of Property Contiguous to Contaminated Sites

The CERCLA definition of a "facility" includes any area where hazardous substances have come to be located. As a result, property owners have been concerned that they could be held liable for contamination that has migrated onto their property from an adjoining parcel. This potential liability has discouraged development of brownfield sites. To eliminate these disincentives, EPA published its "Final Policy Toward Owners of Property With Contaminated Aquifers" in 1995.[xxviii] Under this policy, EPA said it would not hold owners of property liable when groundwater beneath their site has been contaminated from an off-site source if the owner did not contribute to the release of the hazardous substances, was not in a contractual relationship with the person responsible for the release and there is not an alternative basis for imposing CERCLA liability on the owner.

The Brownfield Amendments add a new section 107(q) that codifies this policy as an affirmative defense.[xxix] The new section provides that a person owning property that is contiguous to or otherwise similarly situated to a contaminated site and that is or may be

contaminated by a release or threatened release of a hazardous substance from that contaminated site shall not be considered to be a CERCLA owner or operator solely by reason of the contamination if it can satisfy the following conditions by a preponderance of the evidence:

- The owner has not caused, contributed, or consented to the release or threatened release;[xxx]
- The owner it is not a PRP or affiliated with any other PRP for the property through any direct or indirect familial relationship, a contractual or corporate relationship, or the result of a reorganization of a business entity that was a PRP.[xxxi]
- The owner takes reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;[xxxii]
- The owner cooperates, assists, and provides access to persons that are authorized to conduct response actions or natural resource restoration at the property;[xxxiii]
- The owner complies with any land use restrictions established as part of response action at the site and does not impede the effectiveness or integrity of any such institutional control. In addition, the owner must provides access that is necessary to allow persons authorized to conduct response actions to operate, maintain or otherwise ensure the integrity of land use controls.[xxxiv]
- The owner must comply with all release reporting requirements and other required notices regarding the discovery or release of any hazardous substances at the facility;[xxxv]
- The owner has complied with any EPA request for information or administrative subpoena issued under CERCLA;[xxxvi] and
- The owner conducted an "appropriate inquiry" at the time the person acquired title to the property and did not know or have no reason to know that the property was or could be contaminated by a release or threatened release of 1 or more hazardous substances from other real property not owned or operated by the person.[xxxvii]

A person qualifying as an owner of a contiguous property owner that has been impacted by a plume of contamination migrating beneath the site from the contaminated property shall not be required to conduct ground water investigations or to install ground water remediation systems unless it would otherwise be required to conduct such activity under the EPA 1995 policy.[xxxviii]

Status as an owner of a contiguous property will not preclude that person from asserting any defense to liability that may be available to the person under any other law nor does it impose liability that is not otherwise imposed by section 107(a).[xxxix] If an owner cannot qualify for the contiguous property owner defense because for example it did not conduct an appropriate inquiry, it may still be able to qualify for the BFP defense.

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For persons who qualify as an owner of a contiguous property, the new legislation authorizes EPA to issue assurance that no enforcement action will be initiated under CERCLA and to provide protection against claims for contribution or cost recovery.[xli]

It should be noted that the foregoing defenses only immunize an owner from CERCLA liability. The Brownfield Amendments will not protect a BFP, Innocent Purchaser and Contiguous Property Owner from EPA actions brought under RCRA 7002, citizen suits brought under RCRA 7002, and RCRA corrective action orders.

### F. "Appropriate Care" vs. "Due Care"

Each of these defenses requires a party to exercise "appropriate care" regarding the contamination at the site. It is not entirely clear what Congress intended when it used the term "appropriate care." Certainly, it means that a BFP, innocent purchaser or contiguous property owner may still have to incur response costs at a contaminated site even though it may not be liable as a CERCLA owner or operator. One would think that these required actions would more resemble removal actions and not the full-fledged remedial action and there is some legislative history to support this view. For example, the Senate Committee Report indicated in the section discussing the contiguous property owner defense that owners would not have to undertake full-scale response actions. Instead, reasonable steps such as notifying the government, and erecting or maintaining signs or other barriers would be sufficient to raise this affirmative defense. [xlii] Confusing the issue is the fact that an innocent purchaser is required to exercise both "due care" and "appropriate care." This could suggest that the "appropriate care" standard might be more stringent than the "due care" requirement since there would be no reason to create this requirement if it was not a higher standard.

### G. Brownfield Funding Program

In addition to providing liability relief to purchasers of contaminated property, the Brownfield Amendments establish a statutory brownfield funding program. The law increases the funding for assessment and cleanup of brownfield sites from approximately $96 million to $250 million a year for fiscal years 2002 through 2006. Of this amount, $150 million will be allocated to localities, states and tribes to support site assessment and cleanup. Another $50 million will be used to establish and enhance state and tribal cleanup programs. Finally, $50 million will be available to clean up sites contaminated with petroleum. However, if Congress does not appropriate the authorized amount, 25% of the total funds appropriated by Congress in any one year shall be used to characterize, assess and remediate petroleum-contaminated sites.[xliii]

#### 1. Eligible Brownfield Sites

To be eligible for funding, the property must fall within the new CERCLA definition of a "brownfield site". The term refers to real property where the expansion, redevelopment, or reuse may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.[xliv] The definition of a brownfield site

excludes property that is:

- Subject to a planned or ongoing removal action under CERCLA;
- Listed or proposed for inclusion on the National Priorities List ("NPL");
- Subject to a CERCLA section 106 unilateral order, a court order, an administrative order on consent or judicial consent decree;
- Operating under a permit issued pursuant to RCRA, the CWA, TSCA or the SDWA;
- Subject to corrective action under RCRA section 3004(u) or 3008(h), and a corrective action permit or order has been issued or modified to require the implementation of corrective measures;
- Undergoing RCRA closure for a land disposal unit, a closure notification for a land disposal unit has been submitted or where closure requirements have been specified in a closure plan or permit;
- There has been a release of polychlorinated biphenyls ("PCBs") on a portion of the property that is subject to remediation under TSCA;
- Subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States, except for land held in trust by the United States for an Indian tribe; or
- A response action at the site has received financial assistance from the federal Leaking Underground Storage Tank Trust Fund.[xlv]

EPA is authorized to provide financial assistance to sites that are statutorily excluded from the definition of a brownfield site if EPA determines on a site-by-site basis that financial assistance will protect human health and the environment, and either promote economic development or enable the creation, preservation, or addition to parks, greenways, undeveloped property, other recreational property, or other property used for nonprofit purposes.[xlvi]

One of the limitations of EPA administrative brownfield program had been that sites contaminated with petroleum were not eligible for funding because petroleum was excluded from the CERCLA definition of hazardous substances. The Brownfield Amendments fill this gap by allowing petroleum-contaminated sites to be eligible for brownfield financial assistance if they meet certain conditions. The site must either fall within the definition of a brownfield site or be administratively included within that definition, EPA or a state must determined that the site poses a relatively low risk compared with other petroleum-contaminated sites in the state, there is no viable responsible party to assess, investigate, or cleanup a site, and the site is not subject to a corrective action order. [xlvii]

In addition to petroleum-contaminated sites, mine-scarred land and property contaminated with controlled substances under the Controlled Substances Act[xlviii] land may also be eligible for funding. Sites that qualify as a brownfield site are not precluded from qualifying for assistance under any other provision of Federal law.[xlix]

## 2. Entities Eligible for Brownfield Grants

The Brownfield Amendments add a new section 128 to CERCLA that creates a class of entities who may receive grants to inventory, characterize and remediate brownfield sites. Eligible entities include the following:

- A general purpose unit of local government;
- A land clearance authority or other quasi-governmental entity that operates under the supervision and control of or as an agent of a general purpose unit of local government;
- A government entity created by a State legislature;
- A regional council or group of general purpose units of local government;
- A redevelopment agency that is chartered or otherwise sanctioned by a State;
- A State; or
- An Indian Tribe.[l]

## 3. Uses of Brownfield Funds

Under the EPA administrative brownfield program, parties interested in remediating brownfield sites could only obtain loans through the Brownfield Cleanup Revolving Loan Fund ("BCRLF"). The legislative history for the Brownfield Amendments recognized that brownfield sites redeveloped for recreational property, open space or other non-economic uses would not generate sufficient revenue streams to repay the BCRLF and that it was difficult to obtain private financing for these properties. In addition, the legislative history acknowledged that disadvantaged communities might lack the resources to repay BCRLF awards.[li]

As a result, new CERCLA section 128 directs EPA to establish a program to provide grants to inventory, characterize, assess, and conduct planning related to brownfield sites under paragraph, and to perform targeted site assessments at brownfield sites.[lii] Site assessments performed using funds authorized by section 128 must be conducted in accordance with the ASTM E1527 standard for Phase I Environmental Site Assessments until EPA promulgates standards for what constitutes an appropriate inquiry.[liii]

The grants shall not exceed $200,000 per site though EPA may waive the $200,000 limitation and permit an eligible entity to receive a grant of up to $350,000 for a brownfield site, depending on the anticipated level of contamination, size, or status of ownership of the site.[liv] The grants may be awarded to an eligible entity on a community-wide or individual site basis.[lv] Eligible entities may not receive more than $1 million.[lvi]

EPA may award additional grants to an eligible entity in subsequent years after the year the initial grant is made after taking the following factors into account:

- The number of sites and number of communities that are addressed by the revolving loan fund;
- The demand for funding by eligible entities that have not previously received a grant;

- The demonstrated ability of the eligible entity to use the revolving loan fund to enhance remediation and provide funds on a continuing basis; and
- Other similar factors the Administrator considers appropriate to carry out this section.[lvii]

The eligible entities may use the grant funds to provide assistance for the remediation of brownfield sites in the form of 1 or more loans to an eligible entity, a site owner, a site developer, or another person selected by the eligible entity.[lviii] Recipients may also use a portion of the funds to pay for premiums to purchase environmental insurance premiums, [lix] develop a risk sharing pool, an indemnity pool, or insurance mechanism to provide financing for response actions under a State response program.[lx] However, the brownfield funds may not be used to pay a penalty or fine, a federal cost-share requirement, administrative or oversight costs, a response cost at a brownfield site where the recipient of the grant or loan is a PRP or costs to comply with environmental except the cost of compliance with applicable cleanup laws.[lxi]

EPA is also authorized to provide direct grants of up to $200,000 to eligible entities or non-profit organizations to remediate one or more brownfield sites owned by the eligible entity or non-profit organization.[lxii] In determining whether to make direct remediation grants, EPA is required to take the following factors into account:

- The extent a grant will facilitate the creation, preservation, or addition to a park, a greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;
- The extent a grant will meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment of the area in which a brownfield site is located because of the small population or low income of the community;
- The extent a grant will facilitate the use or reuse of existing infrastructure;
- The benefit of promoting the long-term availability of funds from a revolving loan fund for brownfield remediation; and
- Other similar factors EPA considers appropriate to consider for the purposes of this section.[lxiii]

EPA may also issue grants to eligible entities or nonprofit organizations to provide, training, research, and technical assistance to individuals and organizations to facilitate the inventory of brownfield sites, site assessments, remediation of brownfield sites, community involvement, or site preparation.[lxiv]

The brownfield funds are intended as seed money to leverage other financial resources.[lxv] As a result, the Brownfield Amendments allow eligible entity to use brownfield grant funds in conjunction with other sources of money so long as the funds are used to characterize, assess or remediate the brownfield site.[lxvi]

Local governments may use up to 10% of a brownfield grant to develop and implement a brownfields program that may include monitoring the health of populations exposed to one or more hazardous substances from a brownfield site, and monitoring and enforcement of any institutional controls at a brownfield site.[lxvii] Eligible entities must

pay a matching share which may be in the form of a contribution of labor, material, or services of at least 20% from non-Federal sources of funding unless EPA determines that the matching share would place an undue hardship on the eligible entity.[lxviii]

If EPA determines that a grant or loan recipient has violated or is in violation of a condition of the grant, loan, or applicable Federal law, EPA may terminate the grant or loan, require the person to repay any funds received; and seek any other legal remedies available to the Administrator.[lxix]

### 4. Brownfield Grant Application Process

The Brownfield Amendments direct EPA to review grant applications from eligible entities at least once a year. EPA must also establish a ranking system for evaluating applications. Grants are to be awarded to the eligible entities that EPA determines have the highest rankings under the following ranking criteria:

- The extent a grant will stimulate the availability of other funds for environmental assessment or remediation, and subsequent reuse of an area where 1 or more brownfield sites are located;
- The potential of the proposed project or the development plan for an area where 1 or more brownfield sites are located to stimulate economic development of the area on completion of the cleanup;
- The extent a grant would address or facilitate the identification and reduction of threats to human health and the environment, including threats in areas in which there is a greater-than-normal incidence of diseases or conditions that may be associated with exposure to hazardous substances, pollutants, or contaminants;
- The extent a grant would facilitate the use or reuse of existing infrastructure;
- The extent a grant would facilitate the creation, preservation, or addition to a park, greenway, undeveloped property, recreational property, or other property used for nonprofit purposes;
- The extent a grant would meet the needs of a community that has an inability to draw on other sources of funding for environmental remediation and subsequent redevelopment because of the small population or low income of the community;
- The extent to which the applicant is eligible for funding from other sources;
- The extent a grant will further the fair distribution of funding between urban and non-urban areas;
- The extent a grant provides for involvement of the local community in decisions relating to cleanup and future use of a brownfield site; and
- The extent a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations.[lxx]

Eligible entities may submit applications through the EPA regional offices using forms to be developed by the agency. EPA must publish guidance to assist eligible

entities in applying for grants and coordinate with other federal agencies to help make eligible entities aware of other available Federal resources.[lxxi]

Successful applicants will be required to enter into agreements that will require the recipient to:

- Comply with all applicable federal and state laws,
- Ensure that the cleanup protects human health and the environment,
- Use the grant or loan exclusively to characterize, assess or remediate brownfield sites; and
- Comply with other terms and conditions as the Administrator determines to be necessary to carry out this section.[lxxii]

## H. NCP Compliance

Another drawback of the current administrative brownfield program was that the response actions had to comply with the national contingency plan ("NCP").[lxxiii] This requirement discouraged brownfield redevelopment because it made cleanups more costly and also slowed down the cleanup process. To simply the application process and expedite funding of response actions, section 128 provides that applicants will not have to comply with the NCP. However, if EPA determines that a particular NCP requirement is relevant and appropriate (e.g., public participation), the agency may include this requirement as a condition of the application process. [lxxiv]

## I. NPL Deferral Of Brownfield Sites

Because of concern the property may become stigmatized, many states are increasingly reluctant to have contaminated sites added to the National Priority List ("NPL").[lxxv] The Brownfield Amendments authorize EPA defer final listing of an eligible response site on the NPL at the requested of a state if EPA determines that:

- The state or a private party acting pursuant to a state order or agreement is conducting a response action at the eligible response site in compliance with a state response program that is protective of human health and the environment, and provides long-term protection of human health and the environment; or
- The state is actively pursuing an agreement to perform a response action at the site with a person that the state has reason to believe is capable of conducting a response action.[lxxvi]

EPA may defer the listing for one year from the time the eligible response site is proposed for listing on the NPL. EPA may defer the listing for an additional six months if the agency determines that reasonable progress is being made toward completing the response action, deferring the listing would be appropriate based on the complexity of the site, substantial progress has been made in negotiations and other appropriate factors that EPA may identify.[lxxvii]

EPA may decline to defer, or elect to discontinue a deferral of a listing of an eligible response site if the state is as an owner, operator or a significant contributor of

hazardous substances at the facility. EPA may also decline or discontinue deferral if the agency determines the NCP criteria for issuance of a health advisory have been met or the other conditions for deferral are no longer being met.[lxxviii]

### 7. Funding for State Response Programs

To be eligible for the $50 million for establishing or supporting state cleanup programs, a state must have either executed a Memorandum of Agreement ("MOA") with EPA or established a response program with the following minimum elements:

- Timely survey and inventory of brownfield sites in the State;
- Oversight and enforcement authorities or other mechanisms, and resources that are adequate to ensure that a response action will protect human health and the environment; be conducted in accordance with applicable Federal and State law;
- Oversight and enforcement authorities or other mechanisms, and resources that are adequate to ensure that if a person conducting the response action fails to complete the necessary response activities, including operation and maintenance or long-term monitoring activities, the necessary response activities are completed;
- Mechanisms and resources to provide meaningful opportunities for public participation;
- Mechanisms for approval of a cleanup plan, and a requirement for verification by and certification or similar documentation from the State, an Indian tribe, or a licensed site professional to the person conducting a response action indicating that the response is complete.[lxxix]

### 8. Federal Enforcement Bar At Sites Remediated Under State Brownfield Programs

Over 45 states have enacted brownfield or voluntary cleanup programs that use risk-based cleanups. Purchasers of brownfield sites and their lenders have been concerned that EPA might determine that a site cleanup performed under a state program was inadequate. This fear of federal enforcement is probably more theoretical than real since brownfield sites are not as seriously contaminated as NPL sites and are therefore usually not on the federal enforcement radar screen. However, to address these concerns, approximately a dozen states have entered into a memorandum or agreement where EPA has agreed not to require additional cleanup except under certain circumstances.

The Brownfield Amendments added a new section 129 to CERCLA that bars EPA from bringing enforcement actions under CERCLA when a cleanup is performed at an "eligible response site" and the state response program meets the minimum standards established in this section.[lxxx]

An "eligible response site" under section 129 includes sites that fall within the definition of a brownfield site and those sites that EPA determines are eligible for brownfield financial assistance on a case-by-case basis. [lxxxi] Sites specifically excluded from this definition are NPL sites as well as sites where EPA has conducted or is conducting a preliminary assessment and site inspection, and determines after consulting

with the state that the preliminary score of the site makes it eligible for inclusion on the NPL. However, if EPA determines not to take any further action, the property may be classified as an eligible response site. [lxxxii] In addition, sites that pose a threat to a sole-source drinking water aquifer or a sensitive ecosystem may not be considered an "eligible response site.[lxxxiii]

Congress did not provide for any extensive standards for state response programs in order for the federal enforcement bar to apply at eligible response sites. The only state program requirement is that the state maintain an inventory of sites where response actions have been completed in the previous year and that are planned in the upcoming year. The inventory must be updated at least annually and be made available to the public. Each site should be identified by name and location. The inventory must indicate if a site will be remediated unrestricted use or if institutional controls will be used. The specific land use controls that will be used must also be identified in inventory. [lxxxiv]

The federal enforcement bar is more limited than the BFP, contiguous property owner or innocent purchaser's defense. It is limited to actions involving eligible response sites in states with response programs that meet the minimum statutory standards. In addition, it only applies to CERCLA section 106 unilateral orders to compel a cleanup or a section 107 to recover response costs. In contrast, a BFP, contiguous property owner or innocent purchaser will be immune from CERCLA liability brought by government and private parties at any site.

EPA may bring an enforcement action if one of the following conditions occurs:

- The State requests EPA assistance in the performance of a response action;
- EPA determines that contamination has migrated or will migrate across a state line and further response actions are necessary to protect human health or the environment;
- EPA determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal property;
- EPA determines after taking into consideration the response activities already taken that a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment, and that additional response actions are likely to be necessary to mitigate the release or threatened release; or
- EPA determines after consulting with a state that new information that was not known by the state when the response action was approved or completed has been discovered that indicates further remediation is necessary to protect public health or welfare or the environment.

If EPA decides to take a response action at an eligible response site, the agency must notify the state of the proposed action at least 48 hours before taking the action. The state has 48 hours to notify EPA if the eligible response site is or has been subject to a cleanup conducted under a state program or if the state is planning to abate the release or threatened release, identify the actions that are planned. If the state fails to respond within the 48-hour period, EPA may take immediate action. However, if EPA determines

that more than one of the exceptions to its enforcement bar applies, the agency may take immediate action after notifying the state.[lxxxv]

## II. Small Business Liability Protection Act

Title I of the legislation provides liability relief for certain categories of PRPs at CERCLA sites. These statutory changes essentially codify administrative reforms that EPA has adopted since 1995.

### A. De Micromis PRP Exemption

The law adds a new de micromis PRP exemption to section 107 of CERCLA.[lxxxvi] This exemption apples to generators or transporters who arranged for the disposal or transporting of less than 110 gallons of liquid waste or 200 pounds of solid waste before April 1, 2001.[lxxxvii] In any contribution action, plaintiffs will have the burden of establishing that these conditions do not apply.[lxxxviii]

However, the exemption will not apply if EPA determines that the hazardous substances generated or transported by the de micromis PRP contributed significantly or could contribute significantly to the cost of the response action or natural resource damages, if the person has failed to respond to an information request or otherwise is impeding a response action, or the person has been convicted of a criminal violation for the conduct to which the exemption would apply.[lxxxix] EPA's decision to withdraw the de micromis exemption will not be subject to judicial review.[xc]

### B. Municipal Solid Waste Exemption

The Brownfield Amendments also add a new exemption for certain generators of municipal solid waste ("MSW") that generated the MSW prior to April 1, 2001.[xci] The exemption does not apply to transporters of municipalities that own or operate a MSW landfill.

The exemption defines MSW as waste material generated by a household (including a single or multifamily residence) and commercial, industrial, or institutional entity that is essentially the same as waste normally generated by a household. The waste must be collected and disposed with other MSW as part of normal MSW collection services and contain a relative quantity of hazardous substances similar to that contained in waste generated by a typical single-family household. [xcii] The definition of MSW contains a non-exclusive list of exempt MSW including food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.[xciii] Waste materials that are not eligible for the MSW exemption include combustion ash generated by resource recovery facilities or municipal incinerators, or waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households. [xciv]

The MSW exemption applies to an owner, operator, or lessee of residential

property that generated municipal solid waste.[xcv] Also exempt are businesses generating MSW that employed 100 or fewer workers during the three taxable years preceding receipt of a PRP notice and qualify as a small business concern under the Small Business Act.[xcvi] Finally, the MSW exemption also applies to 501(c)(3) non-profit organizations that employed fewer than 100 paid individuals during the taxable year preceding the PRP notice at the location that generated all of the MSW attributable to the organization.[xcvii]

In any contribution action, plaintiffs will have the burden of establishing that these conditions do not apply.[xcviii] Plaintiffs who are unable to establish that the exemption does not apply will be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees.[xcix]

However, the MSW exemption will not apply if EPA determines that the hazardous substances generated or transported by the PRP contributed significantly or could contribute significantly to the cost of the response action or natural resource damages, if the person has failed to respond to an information request or otherwise is impeding a response action, or the person has been convicted of a criminal violation for the conduct to which the exemption would apply.[c] EPA's decision to withdraw the municipal solid waste exemption will not be subject to judicial review. [ci]

### C. Ability to Pay Settlements

The Brownfield Amendments also codify the EPA Policy On Ability to Pay Determinations.[cii] Under new section 122(g)(7), a PRP that can demonstrate an inability or a limited ability to pay response costs may enter into an expedited settlement to resolve its CERCLA liability. [ciii] When considering a limited ability to pay settlement, 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.[civ]

A PRP requesting a limited ability to pay settlement must promptly provide EPA with all relevant information needed to determine the ability of the person to pay response costs.[cv] EPA may decline to offer a limited ability to pay settlement if EPA determines that the PRP has failed to comply with any request for access or information, an administrative subpoena issued by EPA, or has impeded or is impeding the performance of a response action at the facility.[cvi] If EPA determines that the PRP is unable to pay its total settlement amount at the time of settlement, EPA shall consider alternative payment methods as may be necessary or appropriate.[cvii]

If EPA determines the PRP is not eligible for limited ability to pay settlement, EPA must notify the PRP as soon as practicable after receipt of sufficient information to make a determination and provide the reasons for the declining to enter into such a settlement.[cviii] After a limited to pay settlement becomes final, EPA must promptly notify PRPs who have not resolved their liability for the facility of the settlement. [cix]

As a condition of the settlement, the PRP will be required waive all of the claims (including contribution claims) that the party may have against other PRPs unless EPA determines that requiring a waiver would be unjust. [cx]A PRP that enters into a settlement shall not be relieved of the responsibility to provide any information or access requested in accordance with the limited ability to pay settlement or a CERCLA section 104(e)

request for information.[cxi]

EPA's decision to enter or refuse to enter into a limited ability to pay will not be subject to judicial review.[cxii]

### III. Effect On Concluded Actions

The legislation 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 the enactment of this Act.[cxiii]

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[i] P.L. 107-118
[ii] P.L. 107-118, Tit. II
[iii] Id. at 9601(35)(A)
[iv] Id. at 9601(35)(B)
[v] 42 U.S.C. 9607 (b)(3). The CERCLA third-party defense provides that a person may not be liable under CERCLA if it can establish by a preponderance of evidence that the release was SOLELY to the acts or omissions of a third party who was not an agent or employee of the defendant, the defendant did not have a direct or indirect contractual relationship with the third party, the defendant exercised due care in dealing with the hazardous substances and the defendant took precautions against foreseeable acts or omissions of any third party and the foreseeable consequences of those acts or omissions. This defense has generally been unavailable to purchasers or occupiers of contaminated property or anyone in the chain of title because of the requirement that the person asserting the defense cannot be in contractual relationship with the third party (usually a prior landowner or tenant) who caused the release.
[vi] Id. at 9601(35)(B)(i)(I)
[vii] Id.
[viii] Id. at 9601(35)(B)(ii)
[ix] Id. at 9601(35)(B)(iv)(I)
[x] Id. at 9601(35)(B)(iv)(II)
[xi] Id. at 9601(35)(B)(i)
[xii] Id. at 9601(35)(B)(v)
[xiii] Id. at 9607(r)
[xiv] Id. at 9601(40)
[xv] Id. at 9601(40)(A)
[xvi] Id. at 9601(40)(B)
[xvii] Id. at 9601(40)(C)
[xviii] Id. at 9601(40)(D)
[xix] Id at 9601(40)(E)
[xx] Id at 9601(40)(F)
[xxi] Id.
[xxii] Id. at 9601(40)(G)
[xxiii] Id. at 9601(40)(H). At this point in time, it is unclear if EPA will continue the Prospective Purchaser Agreement ("PPA") program. It is possible that EPA may continue to enter into PPAs for purchasers who do not qualify for the statutory defense owners (e.g., did not conduct due diligence) yet are willing to provide consideration in exchange for the PPA.
[xxiv] 42 U.S.C. 9607(r). This lien is in addition to the non-priority lien provided in section 107(l) of

CERCLA that EPA may impose a on property where it has performed response actions. 42 U.S.C. 9607(l). The lien becomes effective when EPA incurs response costs or notifies the owner of the property of its potential liability, whichever is later. Id. at 9607(2)(A)-(B). However, the lien is subject to the rights of holders of previously perfected security interests. Id. at 9607(l)(3)

[xxv] Id. at 9607(r)(3)

[xxvi] Id. at 9607(r)(4)

[xxvii] Id. at 9607(r)(2)

[xxviii] 60 FR 34790 (July 3, 1995)

[xxix] 42 U.S.C. 9607(q)

[xxx] Id. at 9607(q)(1)(A)(i)

[xxxi] Id. at 9607(q)(1)(A)(ii)

[xxxii] Id. at 9607(q)(1)(A)(iii). The statutory language does not refer to "appropriate care" but the standard is identical to the "appropriate care" provisions in the BFP and innocent purchaser's defense.

[xxxiii] 42 U.S.C. 9607(q)(1)(A)(iv)

[xxxiv] Id. at 9607(q)(1)(A)(v)

[xxxv] Id. at 9607(q)(1)(A)(vii)

[xxxvi] Id. at 9607(q)(1)(A)(vi)

[xxxvii] Id. at 9607(q)(1)(A)(viii). It should be noted that unlike the BFP defense, the contiguous property owner exemption does not refer to the interim due diligence standards that were added to the innocent purchaser's defense. Presumably, this is a drafting oversight and that the same inquiry standards will apply to the contiguous property owner defense. A property owner who does not qualify for the contiguous property defense because the person had, or had reason to have know of the contamination may still be able to qualify for the BFP defense. Id. at 9607(q)(1)(C)

[xxxviii] Id. at 9607(q)(1)(D)

[xxxix] Id. at 9607(q)(2)

[xl] S.Rep. No. 107-2, 107th Cong., 1st Sess. Page 9, (March 12, 2001)

[xli] 42 U.S.C. 9607(q)(3)

[xlii] S.Rep. No. 107-2, 107th Cong., 1st Sess. Page 9, (March 12, 2001

[xliii] 42 U.S.C. 9628(i). It is likely that this program will replace the current administrative brownfield funding program that EPA has been using since 1996. However, BCRLF grants that were awarded before the date of enactment of the law may be used in accordance with the criteria established by the law.

[xliv] Id. at 9601(39)(A)

[xlv] Id. at 9601(39)(B)

[xlvi] Id. at 9601(39)(C)

[xlvii] Id at 9601(39)(D)

[xlviii] 21 U.S.C. 802

[xlix] 42 U.S.C. 9528(j)

[l] Id. at 9628(a)

[li] Senate Report 2, 107 Cong., 1st Sess. Page 6 (March 12, 2001)

[lii] 42 U.S.C. 9628(b)

[liii] Id. at 9628(b)(2)

[liv] Id. at 9628(d)(1)(A)(ii)

[lv] Id. at 9628(d)(1)(A)(i)

[lvi] Id. at 9628(d)(1)(B)(i)

[lvii] Id. at 9628(d)(1)(B)(ii)

[lviii] Id. at 9628(c)(2)

[lix] Id. at 9628(d)(4)

[lx] Id. at 9629(a)(1)(b)

[lxi] Id. at 9628(d)(2)

[lxii] Id. at 9628(c)(1)(B)

[lxiii] Id. at 9628(c)(3)

[lxiv] Id. at 9628(f)

[lxv] Senate Report 2, 107 Cong., 1st Sess. Page 7 (March 12, 2001)

[lxvi] 42 U.S.C. 9628(h)

[lxvii] Id. at 9628(d)(3)
[lxviii] Id. at 9628(i)(c)
[lxix] Id. at 9628(g)(3)
[lxx] Id. at 9628(e)(3)
[lxxi] Id. at 9628(e)(1)
[lxxii] Id. at 9628(i)
[lxxiii] 40 CFR 300
[lxxiv] 42 U.S.C. 9628(e)(1)(A)(ii)
[lxxv] 42 U.S.C. 9605
[lxxvi] Id. at 9605(h)(1)
[lxxvii] Id. at 9605(h)(3)
[lxxviii] Id. at 9605(h)(4)
[lxxix] Id. at 9629(a)(2)
[lxxx] Id. at 9629
[lxxxi] Id. at 9601(41)(c)
[lxxxii] Id. at 9601(41)(c)(i)
[lxxxiii] Id. at 9601(41)(c)(ii)
[lxxxiv] Id. at 9629(b)(1)(C)
[lxxxv] Id. at 9629(b)(1)(D)
[lxxxvi] Id. at 9607(o)
[lxxxvii] Id. at 9607(o)(1)
[lxxxviii] Id. at 9607(o)(4)
[lxxxix] Id. at 9607(o)(2)
[xc] Id. at 9607(o)(3)
[xci] Id. at 9607(p)
[xcii] Id. at 9607(p)(4)(A)
[xciii] Id. at 9607(p)(4)(B)
[xciv] Id. at 9607(p)(4)(C)
[xcv] Id. at 9607(p)(1)(A)
[xcvi] Id. at 9607(p)(1)(B). The exemption applies to the business entity which includes the parent, subsidiaries and affiliates. For purposes of the small business exemption, the term `affiliate' has the meaning of that term provided in the definition of `small business concern' in regulations promulgated by the Small Business Administration under the Small Business Act, 15 U.S.C. 631 et seq.
[xcvii] 42 U.S.C. 9607(p)(1)(C)
[xcviii] Id. at 9607(p)(5)
[xcix] Id. at 9607(p)(7)
[c] Id. at 9607(p)(2)
[ci] Id. at 9607(p)(3)
[cii] General Policy on Superfund Ability to Pay Determinations (September 30, 1997)
[ciii] 42 U.S.C. 9622(g)(7)-(12)
[civ] Id. at 9622(g)(7)(B)
[cv] Id. at 9622(g)(7)(C)
[cvi] Id. at 9622(g)(8)(B)
[cvii] Id. at 9622(g)(7)(D)
[cviii] Id. at 9622(g)(9)-(10)
[cix] Id. at 9622(g)(12)
[cx] Id. at 9622(g)(8)(A)
[cxi] Id. at 9622(g)(8)(C)
[cxii] Id. at 9622(g)(11)
[cxiii] §103 Small Business Liability Protection Act