

**NEW AMENDMENTS TO SUPERFUND ACT
TO AID REDEVELOPMENT AND
LESSEN THE IMPACT OF LIABILITY**

BETH S. GOTTHELF
SEYBURN, KAHN, GINN, BESS AND SERLIN, P.C.
Southfield, Michigan
(248) 351-3590
E-mail: bgotthelf@seyburn.com

On January 11, 2002, President Bush signed into law the Small Business Liability Relief and Brownfields Revitalization Act (“Amendment”), which amends the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), commonly known as the Federal Superfund Act. This Amendment is one of the most comprehensive amendments to CERCLA and makes several changes to CERCLA’s liability scheme to encourage the redevelopment of land. The Amendment can be divided into eight areas. Five concern the liability scheme, one relates to settlements and the last two create federal programs to encourage redevelopment. Below is a brief summary of these changes:

1. Bona Fide Prospective Purchasers.

Under ' 107 of CERCLA, an owner is liable for contamination at a site if the owner is in the chain of title. Under the Amendment, a “bona fide prospective purchaser” will not be liable for existing contamination as long as the owner does not impede the performance of a response action. To qualify for this exemption, the prospective purchaser must establish that (1) the contamination occurred prior to acquisition; (2) the prospective purchaser made all commercially appropriate inquiries in accordance with new due diligence standards (discussed below); (3) the prospective purchaser provided all legally required notices about the discovery of the contamination; (4) the prospective purchaser took reasonable steps to stop the continued release of contamination and limit exposure to previous releases; (5) the prospective purchaser complies with existing or clean-up derived “institutional controls,” such as deed restrictions on the use of the parcel; (6) the prospective purchaser complies with USEPA’s information requests; and (7) the prospective purchaser is not considered a liable party, or affiliated with a liable party. Note that this protection does not extend to sites contaminated with petroleum because CERCLA specifically excludes from the definition of “hazardous substance” petroleum based contamination. One other significant caveat to this provision is that USEPA may impose a lien on the property for any unrecovered response cost.

2. Innocent Landowner Defense.

CERCLA contained a defense against liability if the owner could establish basically that he/she had no reason to believe the site was contaminated and exercised due care. The Amendment revised this defense in several respects. First, it defines due care as cooperating with any on-going clean-up at the site, including access and imposing deed restrictions on the use of the site. The Amendment also further defines due care by stating that the purchaser

must have conducted “all appropriate inquiry”, which will be defined in the future by USEPA through regulations. The new regulations will basically mirror the ASTM standards that most parties follow now.

3. Exemption for Owner if Properties Contiguous to Contaminated Sites.

One problem has been what liability should be imposed on owners of property down gradient of the contamination, especially when the contamination migrates to the down gradient property. The Amendment addresses this problem and provides liability protection as long as the down gradient owner did not contribute to the release and basically cooperates in the remediation.

4. Brownfield Definition.

The Amendment provides several Brownfield incentives. First, it creates a definition for the term. Brownfield means real property where “the expansion, redevelopment or reuse of which may be complicated by the presence or potential presence” of hazardous substances. The definition also extends for grant purposes to both petroleum-contaminated sites that are low risk and there is no viable responsible parties, and mine-scarred land. The definition for funding also generally excludes certain sites, such as federal facilities and PCB sites.

5. Revitalization Funding Program.

One of the more significant parts of the Amendment is a federal funding program. This program creates a grant program of up to \$200 million per year from FY 2002 through 2006. Of these funds, one quarter is to be used for petroleum-contaminated Brownfield sites. Assuming this program will be funded, governmental and redevelopment authorities can apply for grants to inventory potential Brownfield sites, and perform site characterization and assessments (up to \$200,000 per site). Grants of up to \$200,000 are available for remediation and capitalizing revolving loan funds are available for others to remediate the site. Grants may be up to \$1 million in exceptional circumstances.

6. State Response Programs.

The Amendment also creates a grant program for state voluntary remediation programs. Under this grant program, \$50 million per year from FY 2002 through 2006 will be available to states’ Brownfield-related programs or voluntary response programs that are already subject to a Memorandum of Agreement (“MOA”) with USEPA. Currently, 15 states have an MOA with USEPA. The grants may be used to establish or enhance existing programs, such as to capitalize revolving loan funds or create an insurance pool to fund response activities.

7. Small Business Liability Relief.

A significant change from past CERCLA liability is the new de minimis exemption for liability at National Priority List (“NPL”) sites. Under this section, persons whose

liability at a CERCLA site is based on the generation or transportation of less than 110 gallons of liquid waste or less than 200 pounds of solid waste are exempt from liability.

8. Municipal Solid Waste Liability Relief.

Another exemption to liability at NPL sites is for the disposal of municipal solid waste containing hazardous substances. This exemption applies to residential parties, businesses employing fewer than 100 persons and charitable organizations employing fewer than 100 persons. Note that this provision does not include an exemption from liability for municipalities.

9. DeMinimis Settlements.

For parties that contributed only a small amount of waste to a superfund site (DeMinimis Parties), the Amendment requires USEPA to respond promptly to requests for de minimis settlements and take into consideration a party's inability to pay.

Above is just a brief summary of the Amendment. At first blush, it offers prospective purchasers many benefits. However, there are many complicated provisions that must be interpreted. Further, while the grants sound very promising, Congress must appropriate the money to fund the programs.