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The Liability Exemptions in the Senate Brownfields Bill (S. 350)

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Summary

By broad consensus, the stringent Superfund Act liability scheme is a key stumbling block to redevelopment of “brownfields” – underused facilities where expansion or redevelopment is complicated by real or perceived contamination. S. 350, passed by the Senate on April 25, 2001, deals with this problem by adding two new liability exemptions to the Superfund Act, and clarifying a third. Each of these exemptions deals with a type of innocent landowner. The two new exemptions are for owners of land contaminated by a source on contiguous property, and for prospective purchasers of property that is known to be contaminated. The clarifying exception provides detailed content to “all appropriate inquiry,” a phrase used in the existing Superfund Act as a prerequisite to a land buyer’s use of the “innocent landowner” liability defense.

That it would be a good thing to encourage redevelopment of “brownfields” appears to be noncontroversial.¹ “Brownfields,” by way of background, refers to “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.”² Many such sites are located in the urban core, and are well served by infrastructure. Moreover, capital investment steered toward brownfields is capital investment that does not promote urban sprawl on “greenfields” – pristine outlying areas.

By broad consensus, a key stumbling block to redevelopment of brownfields is the stringent liability scheme in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, or “Superfund Act”).³ That scheme imposes strict, joint and several, and retroactive liability on (1) past and present owners and operators of facilities; (2) persons who transported the hazardous substances to a facility; and (3) persons who

¹ For general background on the brownfields issue, see CRS Report 97-731 ENR, *Superfund and the Brownfields Issue*, by Mark Reisch.

² S. 350 § 101(a). See also the similar EPA definition of brownfields at 62 Fed. Reg. 4624, 4624 (1997).

³ 42 U.S.C. §§ 9601-9675.

“arranged for disposal or treatment” of hazardous substances at a facility owned or operated by another – where there is a release, or threatened release, of hazardous substances that causes response costs to be incurred.⁴ As it now stands, CERCLA contains no provisions relaxing its daunting liability provisions for persons who buy brownfields facilities with the socially desirable goal of upgrading them. By becoming an “owner” of a “facility,” and perhaps an “operator” of one as well, such buyers are fully subject to the Act’s liability scheme.

While the statute lacks liability exemptions for brownfields redevelopment, EPA has undertaken several liability-related administrative initiatives to encourage brownfields development. Most directly on point, the agency has allowed expanded use of “prospective purchaser agreements.”⁵ These constitute a “no action assurance” by EPA that it will not enforce against someone who wants to buy contaminated property for cleanup or redevelopment. There must be a clear benefit to EPA (often, obtaining cleanup funding not otherwise available) and/or to the community in entering into the agreement. Another initiative is the EPA “comfort letter,” a notification to the prospective buyer of a brownfield (such as a closed military base) as to EPA’s enforcement intentions there, based on information then known to EPA.⁶ Comfort letters are not binding assurances, however, as the prospective purchaser agreements are. They are solely informational.

The above EPA policies, however, constrain only EPA. They provide no assurance that other parties may not sue under the Act. (In some cases, however, EPA may consider *de minimis* settlement with a buyer to protect him/her from contribution suits.) Also note that while some states, as part of their own brownfields programs, have provided protection from liability under state law as an incentive for investment in these sites, states are without power to waive liability under the federal CERCLA.

To address these liability issues, and to provide other encouragements for brownfields redevelopment, a Senate brownfields bill, S. 350, was introduced on Feb. 15, 2001. In its introduced form, the bill, titled the Brownfields Revitalization and Environmental Restoration Act of 2001, was identical to S. 2700 of the 106th Congress. It was reported from the Senate Committee on Environment and Public Works on March 12⁷ and, with a manager’s amendment, passed the Senate on April 25 by a 99-0 vote.

This report deals solely with the liability provisions of S. 350, found in Title II of the bill. (The manager’s amendment does not concern these.) These provisions cover three types of innocent parties: (1) owners of properties contaminated from contiguous properties, (2) prospective purchasers, and (3) innocent landowners. Parenthetically, one might observe that the name of Title II, “Brownfields Liability Clarifications,” is not particularly apt. Despite the mention of “Brownfields” in the title’s name, the word nowhere appears in the liability provisions proposed by Title II to be added to CERCLA. Thus, it would seem that their application is not restricted to brownfields, but apply to all

⁴ CERCLA § 107(a)(1)-(4); 42 U.S.C. § 9607(a)(1)-(4). Hereinafter, references to “releases” should be deemed to mean releases or threats of releases.

⁵ 60 Fed. Reg. 34792 (1995).

⁶ 62 Fed. Reg. 4624 (1997).

⁷ See Sen. Rept. No. 107-2.

sites where there are released hazardous substances. In addition, it appears that Title II's provisions are far more than "clarifications" of existing law. This is particularly true for the contiguous property and prospective purchaser provisions, which have no counterpart in the existing statute, though they do reflect EPA enforcement practice.

Contiguous properties

CERCLA does not exempt a landowner from liability merely because the contamination on his/her property arrived there from an adjacent property, with no complicity on the landowner's part. One who has the misfortune to own land next to a hazardous-waste dumpsite, for example, may become liable under CERCLA when contaminated groundwater from the dumpsite migrates onto/under his or her property. Under such circumstances, the homeowner becomes an "owner" of a contaminated "facility," a status to which CERCLA attaches liability, as noted. Recognizing the potential injustice of such liability, EPA policies state that the agency will not seek to impose CERCLA liability on residential homeowners unless their activities led to the release,⁸ nor on owners of land above aquifers contaminated by subsurface migration from outside the property.⁹

Section 201 of S. 350 also speaks to innocent owners of contiguous properties – more formally, to those who own land that is "contiguous to or otherwise similarly situated with respect to" land not owned by that person, and that is, or may be, contaminated by a release of a hazardous substance from the contiguous property. Notwithstanding such ownership, section 201 states that such a person shall not be deemed the owner or operator of a facility for purposes of CERCLA liability, if the person satisfies eight conditions. Among those conditions, the person did not cause or contribute to the hazardous-substance release, is not potentially liable or affiliated with any other person that is potentially liable for response costs at a facility, took reasonable steps to stop or prevent releases, and fully cooperates with and gives access to those authorized to conduct response actions or natural resource restoration.

The last-listed of the eight qualifying conditions states that when the person acquired the property, the person conducted "all appropriate inquiry" and yet "did not know or have reason to know" that the property was or could be contaminated by a release or threatened release of hazardous substances from the other property. A person disqualified from invoking the bill's contiguous property exemption because he/she had, or had reason to have, such knowledge, may still qualify for prospective-purchaser status under the bill, discussed below.

⁸ EPA, *Policy Towards Owners of Residential Property at Superfund Sites*, OSWER Dir. No. 9834.6 (July 3, 1991).

⁹ EPA, *Final Policy Toward Owners of Property Containing Contaminated Aquifers*, 60 Fed. Reg. 34790 (1995).

Prospective purchasers and windfall liens

Persons interested in investing in contaminated sites must face the fact that at the moment they accept ownership of the site, they become liable under CERCLA as owners (and perhaps operators). To encourage more investment in such sites, EPA, as noted earlier, has allowed expanded use of “prospective purchaser agreements” – binding commitments by the agency not to enforce against one who wants to buy contaminated property for cleanup or redevelopment. The Senate report, however, asserts that the process of negotiating these case-by-case arrangements has been “cumbersome and resource-intensive.”¹⁰

Section 202 of S. 350 creates a liability carve-out for “bona fide prospective purchasers” whose liability, following purchase, is based solely on their owner or operator status under CERCLA. As with contiguous property owners, however, numerous conditions attach to qualifying as a bona fide prospective purchaser. Two key conditions are first, that the owner bought after the bill is enacted, and second, that the owner does not impede the response action or natural resource restoration. Other conditions demand that all disposal of hazardous substances at the facility occurred before purchase, and that the person made “all appropriate inquiry” into the previous ownership and uses of the facility,” exercises appropriate care as to hazardous substances found at the facility, cooperates with and gives access to those authorized to do response actions or natural resource restoration at a facility, does not impede any institutional control at the facility, and is not potentially liable or affiliated with any other person that is potentially liable for response costs at a facility.

While bona fide prospective purchasers are protected from liability, S. 350 seeks to ensure that they do not reap a windfall in the form of the increase in the property’s value as a result of the federal cleanup. If (a) the United States incurs response costs at a facility acquired by a bona fide prospective purchaser, (b) these costs are not recovered from liable parties, and (c) the response action increases the facility’s value over its pre-response value, then S. 350 states that the Government acquires a lien on the facility. Alternatively, the bill says, the Government may obtain other assurance from the owner that unrecovered response costs will be repaid. The lien shall be in an amount not to exceed the response-action-caused increase in property value, and shall continue until the lien is satisfied or the United States recovers all its response costs at the facility.

Innocent landowners

One of the few defenses allowed by CERCLA to its liability scheme is the “third-party defense.”¹¹ This defense is made available to a person who can show that the release or threat of release of a hazardous substance was caused solely by –

an act or omission of a third party other than ... one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant

¹⁰ Sen. Rept. No. 107-2, at 11.

¹¹ CERCLA § 107(b)(3); 42 U.S.C. § 9607(b)(3).

The third-party defense was contained in the original CERCLA, enacted in 1980. Soon after its enactment, however, the question arose whether this language precluded use of the defense by innocent buyers of previously contaminated land. Such a buyer might hope to escape CERCLA liability by claiming that the hazardous substance on his/her property was caused solely by a third party – that is, by the seller or the seller’s predecessors in title. But therein lies a problem: the buyer has a “contractual relationship” with the seller (the contract of sale), and perhaps an “indirect” one with the seller’s predecessors. Thus, the third-party defense seemed unavailable in this very common circumstance.

To rectify the problem, the 1986 amendments to CERCLA added a definition of “contractual relationship.”¹² “Contractual relationship,” the amendments declared, includes deeds and other instruments transferring title or possession of land – with a big exception. *Not* included are transferring instruments where the land was acquired after the hazardous substances were disposed of, and the person at the time of acquisition “did not know and had no reason to know” that any hazardous substances had been disposed of there. The 1986 amendments went on to explain that to establish that a buyer “had no reason to know,” a buyer must have undertaken, at the time of acquisition, “all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice.”¹³ In sum, one who buys land after “all appropriate inquiry” reveals no hazardous substances has a third-party defense if hazardous substances are later discovered there and a CERCLA cleanup is conducted. Used in this way, the CERCLA third-party defense has become known as the “innocent landowner defense.”¹⁴

Because huge monetary consequences may attach to whether one did “all appropriate inquiry” before buying land, the meaning of the phrase has been long debated. In response, bills have been dropped in several recent Congresses to supply a detailed statutory definition of “all appropriate inquiry.” S. 350 joins this group, through its section 203.

Section 203 gives the EPA Administrator two years after bill enactment to establish standards and practices that define “all appropriate inquiry.”¹⁵ What these regulations must include is carefully spelled out – namely (1) the results of an inquiry by an environmental professional; (2) interviews with past and present owners, operators, and occupants of the facility; (3) reviews of historical sources, such as chain of title documents; (4) searches for recorded environmental cleanup liens; (5) reviews of government records; (6) visual inspection of the facility; (7) specialized knowledge on the part of the defendant; (8) the relationship of the purchase price to the value of the property if uncontaminated; (9) commonly known or reasonably ascertainable information about the property; and (10)

¹² CERCLA § 101(35); 42 U.S.C. § 9601(35).

¹³ CERCLA § 101(35)(B); 42 U.S.C. § 9601(35)(B).

¹⁴ The innocent landowner defense should be distinguished from the innocent landowner provisions in CERCLA section 122(g)(1)(B). The latter offers innocent landowners who have *not* done “all appropriate inquiry” an opportunity for expedited settlement with EPA, rather than a total defense from liability. 42 U.S.C. § 9622(g)(1)(B).

¹⁵ EPA’s definition will also govern the meaning of “all appropriate inquiry” as used in the contiguous property and prospective purchaser provisions of S. 350.

the obviousness of the presence or likely presence of contamination at the property. These requirements for EPA's regulation closely track the contents of the American Society for Testing and Materials (ASTM) standard for environmental site assessments.¹⁶

Section 203 contains special "all appropriate inquiry" definitions for those who bought land prior to the promulgation of EPA's regulations. For property purchased before May 31, 1997, a court shall take into account any specialized knowledge on the defendant's part, the relationship of the purchase price to the value of the property if uncontaminated, commonly known 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. For property purchased on or after May 31, 1997, but before EPA promulgates its standards, the procedures of the ASTM shall constitute "all appropriate inquiry." Because the post-promulgation requirements parallel the ASTM standards, all property bought after May 31, 1997 is held to nearly the same "all appropriate inquiry" standard.

Section 203 also adds a few preconditions to use of the innocent landowner defense to bring it into conformance with the preconditions for the contiguous property and prospective purchaser defenses above. These new preconditions are that the landowner fully cooperates with, and provides access to, persons authorized to conduct the response action; complies with land use restrictions; and does not impede institutional controls at the facility. Under existing CERCLA, the landowner must also exercise due care regarding the hazardous substances at the site, and take precautions against foreseeable acts or omissions of third parties.¹⁷

Finally, section 203 makes explicit what has long been implicit in the "all appropriate inquiry" concept – that buyers of residential property (other than governments and commercial entities) need only meet relaxed standards for adequate inquiry. For such buyers, a facility inspection and title search that reveals no basis for further investigation are sufficient.

¹⁶ ASTM, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* (E 1527).

¹⁷ CERCLA § 107(b)(3); 42 U.S.C. § 9607(b)(3).