SHEARMAN & STERLING

Environmental Practice BRIEFING

SPRING 2002

Abu Dhabi
Beijing
Brussels
Düsseldorf
Frankfurt
Hong Kong
London
Mannheim
Menlo Park
Munich
New York
Paris
Rome
San Francisco
Singapore
Tokyo
Toronto
Washington, D.C.

United States: Superfund Liability Relief and Brownfields Law

On January 11, 2002, President George W. Bush signed the "Small Business Liability Relief and Brownfields Revitalization Act" (the "Act") into law. The Act significantly amends the federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for the first time in more than a decade. As enacted, the Act establishes new categories of parties that are exempt from CERCLA liability, establishes new and varied procedures to obtain CERCLA cleanup liability protection, and provides incentives for the private sector to clean up certain contaminated "brownfield sites".

New Exemptions from CERCLA Liability

The Act provides for two new exemptions to CERCLA's infamously broad liability net. Now exempted from CERCLA liability are so-called "de micromis" parties: parties that arranged for disposal or treatment of, or accepted for transport for treatment or disposal of, less than 110 gallons of liquid materials or less than 200 pounds of solid materials containing hazardous substances. Also now exempted are small businesses (defined as having less than 100 full-time employees), not-for-profit organizations, and owners, operators or lessees of residential property that sent only "municipal solid waste" (i.e., waste with the composition of common municipal trash) to a contaminated landfill.

Neither exemption is available if the materials containing hazardous substances were significant contributors to the cost of the required response action. The exemptions also are unavailable where the potentially exempt party has impeded a governmental response action.

The Act makes it difficult and costly to drag a party, potentially exempt from CERCLA liability by reason of one of the new exemptions, into litigation. The burden is now placed on the party bringing an action against a party potentially exempt by either the de micromis or the municipal solid waste exemption to demonstrate that the party being sued does not qualify for either exemption. Moreover, if a nongovernmental entity brings a contribution action against a party that is later shown to be exempt by reason of either the de micromis exemption or municipal solid waste exemption, the moving party has to pay all reasonable costs of that party's defenses.

"Bona Fide Purchaser" Protection from CERCLA Liability

The Act establishes protection from CERCLA liability for site owners and tenants who come into ownership (or tenancy) after January 11, 2002, and who undertake certain pre-investment activities (the Act also provides guidance as to the application of the "innocent purchaser defense" (which the Act codifies and expands) in respect of transfers of property that occurred prior to January 11, 2002). This "bona fide purchaser" protection extends to site contamination existing on the date of the acquisition, even where no cleanup of the contamination is intended. This protection, however, does not apply to contamination regulated under other federal environmental laws, including contamination from underground storage tanks regulated under the Resource Conservation and Recovery Act.

In order to qualify for the protection from CERCLA liability, the purchaser (or tenant) must

establish, among other things, that the contamination occurred before its ownership (or tenancy), that the purchaser (or tenant) did not cause, contribute to or exacerbate the contamination, is not otherwise potentially liable for the contamination of the site, has taken reasonable steps to stop any further contamination and limit any effects on human health and the environment, has cooperated with governmental authorities in respect of the contamination, and has conducted "all appropriate inquiry" at the time the subject property was acquired (or the tenancy commenced). The Act charges the federal Environmental Protection Agency (the "EPA") with promulgating regulations within two years that set forth the parameters of "all appropriate inquiry" (until those regulations are promulgated, the Act provides that for acquisitions that closed after May 31, 1997, ASTM Standard E1527-97 ("Standard Practice for Environmental Site Assessment Process") is the standard against which "all appropriate inquiry" should be measured; acquisitions that closed before May 31, 1997 are subject to a fact-based analysis of the purchaser's knowledge and experience).

Owners of property contaminated by contiguously located property also are protected from CERCLA liability under the Act, but only to the extent the owner of such property was unaware of the contamination when it bought the property. To benefit from this new protection, the owner of the contaminated parcel must assert the same requirements as the bona fide purchaser described above, except for the demonstration that the contamination occurred before the owner bought the land.

New Incentives to Clean Up Certain "Brownfield" Sites

The Act prohibits the federal government from taking an enforcement action under CERCLA against any person who is conducting a response action at the site in accordance with a state remediation program that is protective of public health and the environment, such as some of the state-enacted voluntary cleanup programs that are frequently the vehicle for voluntary brownfield remediation. This provision doesn't cover sites that would otherwise be expected to undergo cleanups under CERCLA or other federal laws, such as sites subject to consent orders and those listed on the National Priorities List. It also does not apply when there is a release or threatened release that may present an imminent and substantial endangerment and in certain other specified circumstances.

In addition, pursuant to the Act, the federal government significantly increases its direct role in the revitalization of the hundreds of thousands of brownfield sites in the United States. This role takes various forms, including the expansion of the EPA's grant and loan programs to brownfield assessment and redevelopement projects.

European Union: Proposed Liability Scheme

After a decade of debate (much of which centered on the United States' experience with its federal Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")), on January 23, 2002, the European Commission proposed "Directive of the European Parliament and of the Council on Environmental Liability with Regard to the Prevention and Restoration of Environmental Damage." The proposed Directive would create a European Union ("EU")-wide pollution liability scheme that aims both to prevent and to restore environmental damage. Even without the expected heated debate over its provisions, the Directive will take several years to enact.

The Directive reflects the Commission's concern about Europe's: (1) dire loss of biodiversity; and (2) water and soil pollution. Accordingly, the term "Environmental Damage" is defined in the proposed Directive to include damage to biodiversity protected at the EU and Member State levels, damage to waters governed by the EU Water Framework Directive (2000/60/EC), and land contamination which causes serious harm to human health.

Operators who engage in the risky or potentially risky activities listed on Annex 1 to the Directive (e.g., releasing heavy metals into the air or water, producing dangerous chemicals, operating a landfill or incinerator) would be strictly liable for Environmental Damage that occurs to the water or soil. Operators who do not engage in Annex 1 activities but who do cause Environmental Damage to water or soil and operators who cause Environmental Damage to biodiversity would be liable for such damage in accordance with traditional fault-based legal theories. There are several exemptions to the proposed liability scheme, including emissions that have been authorized by license or permit, and activities that were considered scientifically and technically safe at the time that the Environmental Damage occurred. Unlike CERCLA in the United States, the proposed scheme would not have retroactive reach (i.e., it would apply only to contamination that occurred after enactment of the Directive).

When Environmental Damage does occur, the applicable governmental authority of the Member State where the Environmental Damage occurred would be required to ensure that the damage is remedied. The authority would be responsible first for assessing the extent of the Environmental Damage and then determining the most appropriate remedial measures to be taken. The Member States would have great flexibility in their choice of appropriate remedial measures. The Directive would authorize each Member State to either require the liable operator to implement the determined response or to pay for the Member State's response. Each Member State also would be responsible for determining how to finance the remediation of Environmental Damage for which no solvent operator is liable.

While public interest groups and other interested parties would not be able to sue polluters directly under the Directive, the Directive does permit such interested parties to sue applicable governmental authorities to force them to act, or to challenge the decisions of such authorities with respect to remedy selection and other matters relating to the Directive.

New York State: Disclosure of Environmental Conditions

On November 13, 2001, New York State Governor George Pataki signed the Property Condition Disclosure Act into law. The Act calls for sellers of residential real estate to provide a Property Condition Disclosure Statement (a "PCDS") to each potential purchaser of the property (or to such purchaser's agent) prior to that potential purchaser signing a binding purchase and sale contract. The Act is intended to supplement information provided by professional inspections and reports, not replace effective due diligence by a purchaser. Sellers were to begin to comply with the Act on March 1, 2002.

The obligation to provide a PCDS attaches to any seller of residential real property that has four or fewer units. The Act does not apply to sellers of unimproved real property, condominium units or cooperative apartments. Nor does the obligation to provide a PCDS apply to transfers made in the context of foreclosure, transfers of newly-built residential property that has not been inhabited and other specified transfers.

Of the PCDS's 48 questions, numbers 10 through 19 relate to environmental matters. Answering these questions results in the seller disclosing actual knowledge of spills, leaks or other releases of certain listed contaminants, including "hazardous or toxic substances," whether the property is in a flood plain, wetland or agricultural district, whether the property has ever been the site of a landfill, whether storage tanks (either above-ground or underground) have ever been located on the property, whether there is lead plumbing or asbestos on the property, and whether there have been any tests for radon, oil or other potential contaminants in respect of the property. The questions generally are designed to be answered by checking one of four boxes labeled "Yes," "No," "Unkn" or "NA." If the answer is "Yes," the seller is required to

give more information. In a note to the seller on the PCDS, the terms "petroleum product" and "hazardous or toxic substances" are generally defined.

If the seller acquires knowledge, prior to the earlier of closing of the contemplated transaction or occupancy of the property by the purchaser, that would render a previously provided PCDS materially inaccurate, the Act requires the seller to promptly provide that information to the purchaser.

The Act makes two specific, but non-exclusive, remedies available to purchasers to protect their rights under the Act. First, if the seller fails to provide the PCDS pursuant to the Act, the purchaser is entitled to receive a credit of $500 at the closing (thus quantifying, to some extent, the purchaser's risk of closing the transaction without full disclosure). Second, sellers who do provide a PCDS (or a revised PCDS to reflect additional information obtained by the seller) are liable to the purchaser only for actual damages suffered by the purchaser, and only if and to the extent the seller willfully failed to comply with the Act.

United States: ASTM To Finalize New Standard For Asbestos Surveys

A committee within the American Society for Testing and Materials is in the process of finalizing and approving a new standard for the performance of Limited Asbestos Surveys ("LASs"). The standard will state that the objective of the LAS is to provide:

> [A] limited service requested by users to evaluate the presence of asbestos-containing materials in major building systems within buildings involved in real estate transactions, including, but not limited to, acquisitions, sales, leasing and financing. However, a LAS set forth under this standard guide is not intended to serve as a comprehensive survey, inspection or assessment for the presence of asbestos-containing materials in all or most of the building systems throughout a building, nor does this LAS serve to adequately assess the presence of asbestos-containing materials in a building or portions thereof for pre-demolition or pre-renovation purposes. While an LAS is intended to reduce the risk of the presence of ACM within a building, it is not designed to eliminate that risk.

The standard will include three principal activities that will comprise the basis for a minimum LAS: (1) interviews of building owners and review of existing asbestos-containing material reports; (2) a building walk-through; and (3) analyses of certain suspect materials. The standard also will require the preparation of a written report, which must include the findings of the LAS.