

College of Natural Resources Policy Analysis Group

Jay O'Laughlin, Director

P.O. Box 441134, University of Idaho, Moscow, ID 83844-1134

Phone: 208-885-5776 e-mail: jayo@uidaho.edu

FAX: 208-885-6226 website: <http://www.cnr.uidaho.edu/pag>



College of Natural Resources

Experiment Station

Steven B. Daley Laursen, Director

Issue Brief No. 3

September 2003



Superfund Liability Reform in 2002

by

Jay O'Laughlin, Professor and Director
College of Natural Resources Policy Analysis Group
University of Idaho, Moscow

Summary

Prospective purchasers and operators of businesses in "Superfund" hazardous waste cleanup sites, such as northern Idaho's Silver Valley, face potential liability for cleanup costs. This is less of a concern for small businesses since the 2002 Brownfield Act amendments to Superfund law that provide some relief from liability.

Short Summary

Before 2002, prospective purchasers and operators of businesses in Superfund hazardous waste cleanup sites, such as northern Idaho's Silver Valley, faced potential liability for cleanup costs. As reported in PAG Report #6 (MacCracken and O'Laughlin 1991), Superfund law can attach liability, like a tar baby, to buyers, sellers, agents, and lenders, thereby casting a dark cloud over potential economic development activities. Potential liability has been reduced for small businesses by the 2002 Brownfields Act amending CERCLA, the Superfund law.

Because of the recent changes in Superfund law, U.S. Senator Larry Craig's office in Coeur d'Alene requested that the College of Natural Resources Policy Analysis Group at the University of Idaho modify its earlier findings as they are published on the Internet. This PAG Issue Brief is intended to do that. This brief does not offer legal advice, but provides a summary of and references to more thorough analyses available for those concerned about Superfund liability, who would be wise to seek legal counsel.

The remainder of this issue brief summarizes the 2002 Brownfields Act provisions affecting Superfund liability. A brief history of Superfund law (CERCLA), especially liability, is provided for context. Conclusions are that because of partial reform of Superfund law and other development assistance programs, Silver Valley communities have a brighter future.

Liability Reform Summary

Superfund law ("CERCLA") was amended by the Brownfields Act in January 2002 to protect a variety of groups from liability, including those who sent only very small quantities of hazardous waste to a Superfund site, who only sent municipal solid waste, and several categories of "innocent parties" (Bromm 2003, Reisch 2003). The new law clarifies the "innocent landowner" defense (Meltz 2002, Reisch 2003). It also provides protection from Superfund liability for owners of land contaminated by a source on contiguous property, and for prospective purchasers of property that is known to be contaminated. These provisions essentially codify existing EPA policy (Bromm 2003, Reisch 2003). According to the Real Estate Roundtable (RER 2002) the Brownfields Act does the following:

- Protects purchasers of brownfield properties from Superfund liability under CERCLA, even if they knew of the contamination at the time of purchase;
- Protects owners from Superfund liability if they hold property contaminated by pollution that migrated from other sources;
- Protects property purchasers (and their tenants) of contaminated properties from Superfund liability. In order to preserve this liability shield, purchasers must offer access and cooperation to regulators and take "reasonable care" steps with respect to prior releases. Although the government cannot recover remediation costs from these purchasers, a lien may be placed on the property if its unrecovered cleanup costs resulted in an increase of the property's value;
- Prohibits federal enforcement of Superfund regulations against any person — including a party who owned or operated property at the time of a release — who cleans up a contaminated property under a state voluntary cleanup program. This enforcement bar would be limited to eligible properties, but exclude any site that has been already designated for cleanup under federal programs. This enforcement prohibition is not absolute. In exceptional cases, the federal government could initiate enforcement proceedings against a party who had completed a voluntary cleanup under state law;
- Protects owners of property contaminated by pollution that migrated from other property under separate ownership. Owners of property contiguous to sites with contaminated groundwater cannot be required to undertake a ground water investigation or cleanup if that contamination flows under the property, except in unusual circumstances; and

- Clarifies that compliance with the American Society for Testing and Materials (ASTM) due diligence standard meets the “all appropriate inquiry” standard to establish an innocent landowner defense for non-residential property. If a purchaser complies with the ASTM standard and finds no contamination, a liability defense would exist if contamination is subsequently discovered. For a purchaser of residential property, the due diligence standard is less demanding (RER 2002).

History of Superfund Law (“CERCLA”)

Superfund is the principal federal program for cleaning up the nation’s worst hazardous waste sites in order to protect the public health and the environment from releases of hazardous substances (MBA 2002, Reisch 2003). It was created by the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA (Publ. Law No. 96-510, enacted in 1980, as amended). CERCLA, the Superfund law, was designed to clean up abandoned hazardous waste sites around the country. The law also established a Superfund Trust Fund that was supported by dedicated taxes (Reisch 2003), primarily excise taxes on petroleum and specified chemicals and a corporate environmental income tax (NSPE 2002). Before the collection of these taxes expired in 1995, they raised about \$1.5 billion per year. Since then, the only sources of Superfund Trust Fund revenues are those recovered from potentially responsible parties (PRPs), interest on the Fund’s investments, fines, and penalties (NSPE 2002).

Despite its good intentions, CERCLA and the Superfund program have proven to be bureaucratic, complicated, and costly (NAIOP 2003; see, for example, DeLong 1997). Superfund law has imposed retroactive, and at times unfair, burdens on private citizens and companies without regard to their negligence or fault, and it has curtailed economic growth and development (NAIOP 2003).

Superfund Liability. Under the Superfund liability scheme, when a property is purchased the new landowner becomes liable for any release or threat of release of a hazardous substance at the facility. Superfund is a strict liability statute and all parties are jointly and severally liable for “all costs of removal or remedial action incurred by the United States Government or a State” or “any other necessary costs or response incurred by any other person.” A new landowner could be held responsible for the entire clean-up without actually causing the contamination (MBA 2002).

Potentially responsible parties (PRPs) are liable under the Superfund law for the costs of cleanup associated with releases of hazardous substances, and for damages in the form of monetary compensation for injuries to publicly owned natural resources (Reisch 2003). The law’s liability standard is strict, joint and several, and retroactive. Generators of hazardous substances, transporters who selected the disposal site, and past and present owners and operators of the site can all be held liable. The law also allows PRPs to sue other parties, usually generators of hazardous waste, to contribute to the cost of cleanup. This has sometimes led to hundreds of people, including small businesses, being brought into Superfund’s liability net. Because the law’s stringent liability regime has drawn in many parties to pay for hazardous waste cleanup, the law became unpopular in some quarters (Reisch 2003).

The Superfund liability system has serious flaws (ABC 2003). Levels of cleanup under the law are inconsistent from one site to another. Cleanup costs and risk levels are very high because of a liability scheme generally considered unfair and conducive to excessive litigation. The average cost of cleanup is about \$30 million per site. The law has been especially burdensome on small businesses and other minor parties who get caught unfairly in the liability net (ABC 2003).

The U.S. Environmental Protection Agency (EPA) is responsible for administering the Superfund law. According to Helmstetter and Schiller (2002), the EPA always has been uncomfortable with Superfund’s impact on small parties. Even under its policy of fair and equitable enforcement, EPA’s modus operandi in Superfund litigation has been to concentrate on major potentially responsible parties (PRPs). But the major PRPs frequently pursued their rights of contribution against all other PRPs,

including local shopkeepers and the Little Sisters of the Poor. And because joint and several Superfund liability attached to any PRP that contributed a thimbleful of hazardous substances to the site, even the smallest parties were willing to pay hundreds, sometimes thousands, of dollars in settlement rather than become enmeshed in Superfund litigation. The inequities often were most dramatic at municipal solid waste disposal sites at which industrial waste and household trash had been commingled for decades. On a case-by-case basis the EPA has tried to blunt third-party collection efforts against the smallest contributors by granting them contribution protection for one dollar or other nominal amount; but EPA's pre-emptive strikes often gave rise to additional litigation as the major PRPs either challenged EPA's right to preempt, or sought a corrected allocation (Helmstetter and Schiller 2002).

In 1993, the EPA moved to address criticisms of the Superfund program by starting what became three rounds of 49 administrative reforms to make the agency's operation of the program faster, fairer, and more efficient (Reisch 2003). Although industry groups gave the EPA credit for improving the program, many said additional changes requiring legislation were still needed. From an industry perspective, reforms should have included replacing CERCLA's liability regime, reforming cleanup standards and remedy selection, changing the law's provisions on natural resource damages, and instituting a different means of funding the program (Reisch 2003).

Superfund Reauthorization Attempts in the 1990s. Although there were three serious proposals to change Superfund law through comprehensive reauthorization in the 103rd to 106th Congresses (i.e., 1993-2000), none of these bills reached the floor in either chamber because of opposition by key members (Reisch 2003). Several issues proved particularly challenging in these attempts to reauthorize CERCLA. The issues most debated were liability, remedy selection, cleanup standards, state role, and the amount of natural resource damages liable parties must pay. These issues are briefly discussed by Reisch (2003), along with comments on how the reported bills during that time generally would have dealt with these issues.

Because the liability scheme of Superfund law — joint and several liability on a strict and retroactive basis — drew in many parties, sometimes hundreds at a particular site, in protracted and expensive litigation, the bills of the 1990s consequently provided protection against Superfund liability for more than a dozen categories of parties. Not all categories appeared in each bill. To limit litigation the bills would have established an allocation process, conducted by a neutral person, to divide cleanup costs among responsible parties. Those not accepting the allocation would have been subject to CERCLA's joint and several liability (Reisch 2003). These bills did not become law.

Liability Reform in 2002 — The Brownfields Act

Although Congress had been highly critical of the Superfund program throughout the 1990s, little movement to reform it occurred until late 2001 when legislation expediting the clean up of "brownfields" was enacted (NSPE 2002). In December 2001, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (Publ. Law No.107-118). After President George W. Bush signed the Brownfields Act on January 11, 2002, its amendments to the Superfund law (CERCLA) may have blunted some criticism (Reisch 2003). The Brownfields Act attracted significant support from environmental organizations, the real estate industry, and local governments (RER 2002).

The new law has two titles within it, reflecting the combined House and Senate bills. This brief refers to them together as the Brownfields Act, which revises or amends some portions of CERCLA. The Act reforms federal Superfund law, which has been the major hindrance to brownfields cleanup. This Act provides liability protection for prospective purchasers, contiguous property owners, and innocent landowners. In addition it authorizes increased funding for state and local programs that assess and clean up brownfields (White House 2002). The Act authorizes \$250 million annually from FY02-06

to fund assessment and cleanup activities, with \$200 million authorized to fund state and local grants for brownfields assessment and cleanup, and \$50 million for grants to enhance state and local cleanups (NSPE 2002). The Act also provides common sense relief from Superfund liability for small business owners who sent waste or trash to waste sites, thus protecting innocent small businesses while ensuring that polluted sites continue to be cleaned up by those most responsible for the contamination (White House 2002).

What is a “brownfield”? There are approximately 400,000 “brownfield” sites in the country. The EPA defines these as abandoned, idled, or underutilized industrial or commercial facilities where expansion or redevelopment is complicated by real or perceived environmental contamination (MBAA 2002).

Brownfields differ from Superfund sites in the degree of contamination. Superfund sites pose a real threat to human health and/or the environment. Brownfields, on the other hand, do not pose serious health or environmental threat. Instead they represent an economic or social threat because they prevent development and therefore stifle local economies (NSPE 2002).

While brownfields can present excellent redevelopment opportunities, they are an underutilized asset that could help communities address a number of issues, including revitalizing urban areas, increasing tax revenues, and promoting sustainable growth. In order to participate in brownfields redevelopment, lenders and developers must determine an acceptable balance of risk and potential return on investment. This determination requires analysis of a complex array of state and federal environmental laws and regulations (MBAA 2002).

The Mortgage Bankers Association of America (MBAA 2002) believes that environmental laws should facilitate redevelopment of urban areas, including brownfields sites, and provide appropriate protections against liability for lenders and developers. MBAA joined with other industry groups in support of legislation that will clean up and redevelop thousands of brownfield sites across the nation. MBAA testified at Congressional hearings in support of the Brownfields Amendments legislation and lobbied for its passage (MBAA 2002).

The Brownfields Act will aid states and localities in cleaning up polluted industrial sites (MBAA 2002). The act provides: [1] the application of federal prevailing wage rates to new state grant programs for cleanups; [2] the exemption of small businesses from liability if they do not contribute a significant amount of waste; [3] an exemption for innocent purchasers from having to pay decontamination costs if toxic waste is found on a site after it has been purchased; and [4] a finality provision limiting EPA’s ability to require further cleanup of a site that has been declared clean, except in the following instances: [a] if a state requests EPA to intervene; [b] EPA determines contamination has crossed state lines; [c] there is “imminent and substantial” endangerment to the environment and the public; or [d] EPA determines there is new information (MBAA 2002).

Liability Reforms. The Brownfields Act (Public Law No. 107-118) is divided into two Titles. Title I, subtitled the Small Business Liability Protection Act, carves out small-contributor exemptions from CERCLA liability with respect to pending and future Superfund litigation (Helmstetter and Schiller 2002). These provisions should provide much-welcomed liability relief to small businesses and parties sending only very small (*de micromis*) amounts of hazardous substances to a Superfund disposal site, parties that otherwise would be subject to CERCLA’s harsh liability provisions (Brendel 2002). Under the small business liability provisions of the law, Section 107 of CERCLA was amended to provide an exemption for businesses that disposed of less than 100 gallons of liquid or less than 200 pounds of solid hazardous material. It also exempts from Superfund liability households or businesses that employ no more than 100 workers and those that disposed of only municipal solid waste at a Superfund site (NSPE

2002).

Title II, subtitled the Brownfields Revitalization and Environmental Restoration Act of 2001, codifies and authorizes funding for a national program for the cleanup and redevelopment of contaminated real estate (Helmstetter and Schiller 2002). The remainder of this section provides an overview of the liability reforms in both Title I and Title II, as it is sometimes difficult to tell from the references cited herein which title deals with which form of liability relief.

The Act offers these liability-reducing features: [1] the innocent-landowner defense, available to persons who acquire land after the hazardous substance is put there, and who (among other things) find no contamination before acquisition despite “all appropriate inquiry”; [2] use of the innocent-landowner status as a basis for early *de minimis* settlement with EPA; and [3] exemption of the “bona fide prospective purchaser” from “owner” and “operator” liability despite pre-acquisition awareness of contamination on the property, if certain conditions are met (see Meltz 2002 for details).

The Act clarifies the Superfund law’s “innocent landowner” defense. CERCLA provides a defense against liability for a person who unknowingly purchased contaminated land, provided the person made “all appropriate inquiry” prior to the transaction. The Act spells out what comprises all appropriate inquiry for the purchaser to qualify as an innocent landowner under the law. These provisions would apply to all contaminated sites, not just brownfields (Reisch 2003). Lenders and recyclers were granted relief in other legislation (Reisch 2003).

In addition, the Act discourages PRPs from bringing third-party contribution actions against exempt parties by shifting the burden of proof to the private-party plaintiffs and by creating the risk of an attorney’s fee award to a prevailing defendant. Thus, the decision whether or not to sue small contributors in the future will, for the most part, be left to the EPA, which probably will decline to do so unless it determines that a particular party has contributed significantly to the contamination (Helmstetter and Schiller 2002).

The EPA issued interim guidance clarifying some of the conditions that contiguous property owners (“CPOs”), bona fide prospective purchasers (“BFPPs”), or innocent landowners (“ILOs”) must meet to qualify for the liability limitations provided in the Brownfields Act (Bromm 2003). In addition, the EPA issued guidance on the definition of eligible response site provided in the law and how the agency plans to implement its authorities to exclude particular sites from the definition of an eligible response site. Both guidance documents clarify how the EPA intends to use its enforcement discretion in specific situations not to pursue certain potentially liable parties. Links to the EPA Website addresses containing these guidance documents (e.g., Bromm 2003) are provided by the EPA (2003). As the EPA gains more experience implementing the Brownfields Act, the agency may revise this guidance. According to Bromm (2003), the EPA welcomes comments on this guidance and its implementation, with comments submitted to contacts identified by Bromm (2003).

Conclusions

Although the Brownfields Act did not provide the total overhaul of CERCLA that many Superfund critics had hoped for, the law does revise several key liability provisions (Brendel 2002). In sum, this legislation is designed to spur the redevelopment of contaminated industrial/commercial properties (known as “brownfields”) by [1] authorizing increased funding for assessment and remediation of these brownfield sites; [2] providing (or clarifying) liability protection for certain landowners under the Superfund statute (e.g., bona fide prospective purchasers, contiguous property owners and innocent landowners); [3] providing liability relief for some generators of municipal solid wastes (e.g., small businesses, non-profits), and for very small (*de micromis*) contributors of hazardous substances at federal Superfund sites; and [4] providing a bar on enforcement by the U.S. Environmental Protection Agency (EPA) at sites where response actions are conducted in compliance with a state brownfield

cleanup program. These legislative changes should not only serve as an incentive to reuse and redevelop brownfield properties, but also should have an impact upon the disposition of any real estate in the United States (Howard 2002).

In the past, concerns about Superfund liability have discouraged many property owners and developers from getting involved with brownfield projects (Hird 2002). The liability reform in the Brownfields Act provisions are intended to allay those concerns by providing substantial protection for new purchasers and property owners undertaking voluntary cleanup. But the liability reform protections are not absolute: Each comes with qualifications and exceptions, so that the federal government may take enforcement action in unusual cases. Nonetheless, the very existence of these protections, even though incomplete, should encourage purchasers and developers to undertake brownfield projects (Hird 2002).

Overall, this legislation should increase the reuse and redevelopment of brownfields sites by providing new funding mechanisms for eligible entities and additional liability protections for real estate purchasers and developers (Howard 2002). The liability protection provisions of this new legislation may alter the way that buyers and sellers deal with real estate and related transactions. For example, to maximize the applicability of the prospective purchaser provisions, new buyers will likely be much more careful in developing a "baseline" to demonstrate that the contamination occurred entirely before the acquisition. It also should be recognized that there are plenty of "soft" words throughout the legislation that may spawn litigation in the future (Howard 2002).

The future is looking brighter for some Silver Valley communities, and not only from potentially reduced Superfund liability that should encourage new businesses. For example, in 2004 the EPA will provide the largest single grant of Superfund money in the nation (\$15 million) to help Kellogg transform into a four-season destination resort. Eagle Crest Communities, owner and operator of the Silver Mountain ski area, will spend \$10.5 million to build a golf course, 1000 housing units, and a 140-acre light industrial park (Geranios 2003).

In addition, the first steps for approval of federal assistance funds have been taken to help Wallace upgrade the historic Pulaski Trail. During the 1910 fires that swept through the Coeur d'Alene and Bitterroot Mountains in Idaho and Montana, at least 85 people died and one-third of Wallace burned to the ground. During this episode, often called the Big Blowup, U.S. Forest Service Ranger Ed Pulaski saved the lives of 38 of his crew by herding them into a mine entrance near Wallace as flames engulfed the area. Later he invented a firefighting tool widely used today, a hybrid axe and mattock called a Pulaski. Reconstruction of the trail and mine entrance are the first elements in a plan that includes developing a National Wildfire Education Center and Museum in Wallace or Silverton (Pulaski Project 2003).

Prospective purchasers and operators of businesses in Superfund sites, like the Silver Valley, would be well advised to seek legal counsel regarding Superfund cleanup liability. The Brownfields Act provisions described herein may provide significant relief from the otherwise burdensome liability scheme of Superfund law.

References Cited

- Associated Builders and Contractors (ABC). 2003. Superfund/Brownfields. Arlington, VA. Available online at <http://147.208.25.192/documents/superfund03.pdf> (accessed July 2003).
- Brendel, J.R. 2002. New brownfields law reforms Superfund liability. Thorp, Reed & Armstrong LLP, Pittsburgh, PA. Available online at www.thorpreed.com/legalnews.html (accessed September 2003).
- Bromm, S.E. 2003. Interim guidance regarding criteria landowners must meet in order to qualify for bona fide prospective purchaser, contiguous property owner, or innocent landowner limitations on CERCLA liability (“common elements”). Memorandum, March 6, U.S. Environmental Protection Agency, Washington, DC. Available online at www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf (accessed September 2003).
- DeLong, J.V. 1997. *Superfund XVII: The Pathology of Environmental Policy*. Competitive Enterprise Institute, Washington, DC. Available online at www.cei.org/gencon/025,01197.cfm (Accessed September 2003).
- Geranios, N.K. 2003. Silver Valley looks for a silver lining: feds throw in with residents to turn mining center into tourist mecca. *Lewiston Morning Tribune*, August 3, p. 1E.
- Helmstetter, C.H., and B.E. Schiller. 2002. Superfund reform shields small contributors and encourages brownfields buyers. Spencer Fane Britt & Browne LLP, St. Louis, MO. Available online at www.spencerfane.com/content/content/145.asp (accessed August 2003).
- Hird, D.B. 2002. Memorandum to Real Estate Roundtable re the Brownfields Revitalization and Environmental Restoration Act of 2001. Weil, Gotshal & Manges LLP, Washington, DC. Available online at <http://rer.org/media/newsreleases/reformbill.cfm> (accessed June 2003).
- Howard, L.P. 2002. New brownfields legislation and superfund reform: New funding and liability protections available. *The Administrative Watch* 4(1); Babst, Calland, Clements & Zomnir, PC, Pittsburgh, PA. Available online at www.bccz.com/publications_fram.html (accessed August 2003).
- Meltz, R. 2002. “Innocent landowners” and “prospective purchasers” in the Superfund Act. RS21167, Congressional Research Service, The Library of Congress, Washington, DC. Available online at www.cnire.org/nle/crsreports/waste/waste-37.pdf (accessed June 2003).
- Mortgage Bankers Association of America (MBAA). 2002. MBAA issue paper: Environmental issues. Available online at www.mbaa.org/library/isp/2002_5/03_03.html (accessed September 2003).
- National Association of Industrial and Office Properties (NAIOP). 2003. Government affairs: Brownfields & brownfields remediation tax. Washington, DC. Available online at www.naiop.governmentalaffairs/superfund.cfm (accessed June 2003).
- National Society of Professional Engineers (NSPE). 2002. Issue brief: Superfund & brownfields. Available online at www.nspe.org/govrel/gr2-4026.asp (accessed June 2003).
- Pulaski Project. 2003. FY2004 congressional appropriation for the Pulaski Trail Project leaps first hurdle. Available online at www.pulaski-project.org (accessed September 2003).
- Real Estate Roundtable (RER). 2002. Bulletin: Brownfields reform bill signed into law — Provides property owners federal clean-up liability protection. Available online at <http://rer.org/media/newsreleases/reformbill.cfm> (accessed July 2003).
- Reisch, Mark (2003). Brownfields and superfund issues in the 108th Congress. Congressional Research Service Issue Brief IB10114, The Library of Congress, Washington, DC. Available online at www.ncseonline.org/nle/crsreports/03Jun/IB10114.pdf (accessed September 2003).
- U.S. Environmental Protection Agency (EPA). 2003. Brownfields liability and cleanup issues. Available online at www.epa.gov/swerosps/bf/liab.htm (accessed September 2003).
- White House, The. 2002. Press release fact sheet: President signs legislation to clean environment & create jobs, Jan. 11. Available online at www.whitehouse.gov/news/releases/2002/01/20020111-4.html (accessed June 2003).