

Liability Under the New Brownfields Law

- Basic Liability Concepts Remain
- New Liability Exemptions
 - Common Elements
 - De Micromis
 - Municipal Solid Waste (MSW)
 - Contiguous Property Owner
 - Bona Fide Prospective Purchaser
 - Windfall Lien

Common Elements

- Appropriate inquiry
- Compliance with institutional controls
- Not impeding response actions
- Reasonable steps
- Cooperation, assistance and access
- Compliance with information requests and subpoenas
- Providing legally required notices

De Micromis Exemption

- Applies to arrangers and transporters at NPL sites
- < 100 gallons of liquid or 200 pounds solid (subject to regulatory change)
- All or part of the disposal, treatment or transport occurred before 4/1/2001

De Micromis

Exceptions to the Exemption!

- Material contributes or could contribute significantly, individually or in the aggregate, to the cost of the response action; or
- Information request non-compliance; impedes (by action or inaction) response action; or
- Standing criminal conviction for conduct to which exemption would have applied.

MSW Exemption Definition

- 1) Generated by a household;
- 2) Generated by commercial, industrial or institutional entity where:
 - Waste same as household waste;
 - Waste collected and disposed of with other normally collected MSW; **and**
 - Waste contains a relative amount of hazardous substances no greater than normally found in household MSW.

MSW Examples

- Food and yard waste
- Paper
- Clothing
- Appliances
- Consumer product packaging
- Disposable diapers
- Office supplies
- Cosmetics
- Glass and metal food containers
- Elementary and secondary school laboratory waste
- Household hazardous waste

MSW Exemption

- Applies to arrangers at NPL sites who are:
 - Owners of residential property from which the MSW was generated;
 - Small business entity (<100 full-time employees) from which MSW was generated;
or
 - Non-profit organizations (having < 100 paid individuals) from which the MSW was generated.

MSW

Exceptions to Exemption!

- MSW contributes significantly to the cost of response;
- Information request non-compliance; or
- Impedes, by action or inaction, the response action.

Contiguous Property Owner (CPO) Exemption

- Applies to current or past owner of real property that:
 - 1) Is contiguous to, or similarly situated with respect to; and
 - 2) May be contaminated by a release or threatened release of a hazardous substance from;
 - 3) real property not owned by the CPO...

CPO Exemption (Cont)

- If:
 - Person did not cause, contribute or consent to release or threatened release of hazardous substance;
 - Person is not a PRP, or affiliated with anyone who is by virtue of:
 - Direct or indirect familial relationship;
 - Contractual, corporate or financial relationship (other than a contract for sale of goods or services).
 - Person or entity not a result of reorganization of a business that is PRP.
 - Person meets all of the common elements.
 - Person did not know or have reason to know that property was or could be contaminated by a source property.

Bona Fide Prospective Purchaser (BFPP) Exemption

- Applies to owner of real property where:
 - Property purchased after 1/11/02;
 - Disposal of hazardous substances on property occurred prior to acquisition by current owner;
 - Current owner meets all common elements;
 - Current owner does not have:
 - Direct or indirect familial relationship with PRP;
 - Contractual, corporate or financial relationship with PRP (other than for transfer of title to property in question or for sale of goods and services;
 - Current owner not an entity which results from the reorganization of a liable business.

Windfall Lien

- A statutory windfall lien exists on BFPP property equivalent to:
 - Increase in fair market value attributable to EPA response action
 - Not to exceed unrecovered response costs.
- Lien arises at first incurrence of U.S. response costs and continues until satisfaction of lien or recovery of all response costs.

Relevant Guidance Documents

- Bona Fide Prospective Purchasers and the New Amendments to CERCLA (5/31/02)
- Revised Settlement Policy and Contribution Waiver Language Regarding Exempt and Non-Exempt De Micromis Parties
- Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for BFPP, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability “Common Elements” (3/06/03)
- Common Elements Guidance Reference Sheet (3/06/03)

Relevant Guidance Documents (Cont)

- Windfall Lien Guidance: Frequently Asked Questions (7/16/03)
- Interim Enforcement Discretion Policy Concerning Windfall Liens (7/16/03)
- Interim Guidance on the MSW Exemption (8/20/03)
- Interim Enforcement Discretion Guidance Regarding Contiguous Property Owners (soon)