

# MASSACHUSETTS LAWYERS WEEKLY

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## Federal Brownfields Reform Remains Uncertain

By Jeffery R. Porter



The very real prospect that Brownfields reform legislation could pass in Massachusetts is becoming a hot topic in the real-estate development and legal communities.

However little attention is being paid to Congress's consideration of practically identical reforms to federal law

through changes to the Comprehensive Environmental Response, Compensation and Liability Act of 1980, also known as CERCLA, or the federal Superfund statute.

Absent strong public support for these federal reforms, the prospects for favorable action in Washington are far from certain.

To completely solve our Brownfields problem we must do two things. First, state and federal liability reform must be enacted, freeing for redevelopment those sites which would be reused if not held hostage by the current liability scheme.

Next, sufficient federal and state incentives must be provided to encourage the redevelopment of those Brownfields sites in urban and economically depressed areas for which there are hindrances to development beyond their environmental condition or the current liability scheme.

There are currently pending in Congress four separate Brownfields liability reform bills and three Brownfields tax incentive proposals which would accomplish both of these goals. As is the case here in Massachusetts, these proposals have many more similarities than differences.

On Capitol Hill, as in Massachusetts, both the Democrats and the Republicans have filed Brownfields reform legislation that would allow someone who purchases and cleans up contaminated

property to be exempt from liability to the government, or anyone else, for costs resulting from the prior contamination of the property. All of the proposals expand the definition of "Brownfields" to generally include any site underutilized as a result of the presence or suspected presence of contaminants.

All of the proposals also provide significant funding for Site Inventory and Assessment and Revolving Loan for Cleanup Programs at the federal level similar to the Industrial Sites Recycling Fund and Redevelopment Access to Capitol Programs proposed here in Massachusetts.

Likewise, all but one of the bills provide funding for the development of Qualified State Voluntary Cleanup Programs, like the program established by G.L.c. 21E and the Massachusetts Contingency Plan, to which the federal government would ultimately defer in most circumstances instead of pursuing cleanups under the federal Superfund program.

### Liability Reform Bills

The pending liability reform bills are the Land Recycling Act of 1997, cosponsored by Reps. Jim Greenwood, R-PA, and Ron Klink, D-PA; the Community Revitalization and Brownfields Cleanup Act of 1997, authored by Rep. John Dingell, D-PA, and cosponsored by 47 other members of Congress including Rep. Edward Markey of Massachusetts; the Brownfields and Environmental Cleanup Act of 1997, authored by Sen. Frank Lautenberg, D-NJ, and cosponsored by 10 other Democratic senators including Edward Kennedy of Massachusetts; and the Superfund Cleanup Acceleration Act of 1997; authored by Sen. Bob Smith of New Hampshire and cosponsored by 21 other Republican senators. Senator Smith's bill also makes sweeping changes in the Superfund program beyond Brownfields liability reform, some of which are quite troubling and do not have broad based support.

All four liability reform bills would exempt from Superfund liability any "bona fide purchaser" of a Brownfields site. To qualify as a bona fide purchaser, a person may not have disposed of any hazardous substances at the site, must have made appropriate inquiry into the environmental conditions at the site prior to purchase, must have provided any notices required under federal law with respect to the presence of any contamination detected at the site, and must

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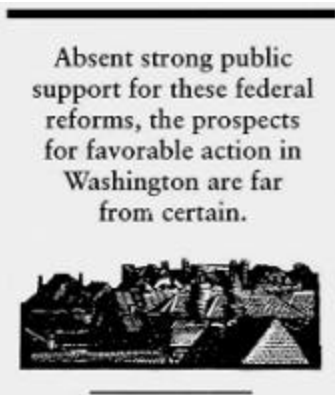
have exercised "appropriate care" and taken "reasonable steps" with respect to the containment of any contamination detected at the site and the mitigation of any risk posed by that contamination.

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The bona fide purchaser liability exemption provided by these Brownfields liability reform bills is much broader than the "innocent owner" defense to Superfund liability currently available under the statute.

The innocent owner defense is available only to owners of already contaminated property who prior to purchasing the property undertook "appropriate inquiry" into the environmental condition of the property and can establish that following that inquiry "did not know and had no reason to know that any hazardous substance which is the subject of (a) release or threatened release was disposed of on... (the property)." See 42 U.S.C. section 9601(35).

In the Brownfields redevelopment context, a purchaser's environmental due diligence should be sufficiently comprehensive that it would be nearly impossible to meet the elements of the innocent owner defense. The bona fide purchaser liability exemption allows a Brownfields redeveloper to discover and assess contamination and still remain exempt from liability as long as she meets the conditions described above.



The Dingell, Lautenberg and Smith bills all provide between \$10-15 million per year in federal funding for three to five years to provide grants for the inventory and assessment of Brownfields sites. This funding is intended to allow the expedited

identification and characterization of Brownfields sites nationwide.

The three bills also provide between \$15-30 million per year in federal funding for the capitalization of a Revolving Loans for Cleanups fund. The Dingell and Lautenberg bills exempt certain sites - including sites which are the subject of an Administrative Consent Order or a judicially approved Consent Decree - from eligibility for the federally financed loans.

The Smith bill provides criteria to be considered in making remediation grants, including (1) the extent to which a remediation grant will stimulate the availability of other cleanup funds; (2) the extent to which the grant will stimulate economic activity; (3) local community support for the proposal project; (4)

The windfall lien is to be equal to the amount of any increase in the fair market value of the site attributable to either the federal government's cleanup activities or the use of federal funds.

Unlike the other three bills, the Greenwood-Klink Windfall Lien provisions does not apply to sites where a seller has no CERCLA liability or has resolved that liability or the current owner can successfully assert the innocent owner defense.

The Dingell bill provides \$75 million and the Smith bill provides \$125 million for the development and enhancement of state voluntary response programs. The Greenwood-Klink, Dingell and Smith bills all provide for federal deference to "qualifying" state voluntary response programs.

Under the Smith proposal, federal enforcement would be precluded with respect to any sites which are the subject of a response pursuant to a qualifying state program. Even if a state does not have a qualifying state program, state concurrence would be required prior to a federal enforcement action. At the other end of the spectrum, the Lautenberg proposal does not restrict federal enforcement at all.

The Greenwood-Klink and Dingell proposals are in the middle of the spectrum on this issue. Under the Greenwood-Klink proposal, federal enforcement would be precluded with respect to any sites which are the subject of a response pursuant to a qualifying state program unless the site is: (1) a site proposed for or presently listed on the National Priorities List (the list of federal Superfund sites); (2) a federal facility; (3) a site which is the subject of a federal Administrative Consent Order or a Consent Decree approved by a federal court; or (4) a site which is the subject of an already initiated judicial or administrative action.

The Dingell proposal adds the following to the Greenwood-Klink exempted sites: sites which the federal government determines pose an "imminent and substantial danger," sites with respect to which a state requests federal enforcement, and sites at which the federal government determines there has been a change in the conditions identified by the state in approving a response action. These proposed limitations on federal enforcement authority are not essential to solving the Brownfields problem and are likely to result in lengthy debate.

The Dingell and Smith bills also provide a "contiguous property exemption" from CERCLA liability analogous to the "downgradient property exemption" to liability under G.L.c. 21E contained in the bills filed by Rep. Peter Larkin, D-Pittsfield, and Gov. William F. Weld here in Massachusetts.

state and local financial involvement in the project; and (5) the reduction of health and environmental risks that will result from the proposed remedial action.

The Dingell, Lautenberg and Smith bills provide for a "windfall lien" in the federal government's favor to run with a Brownfields site where the federal government has incurred cleanup costs or extended a loan from the Revolving Loans for Cleanups fund.

The proposed federal contiguous property exemption would be available to any owner of a site adjacent to a contaminated site who did not cause or contribute to the contamination at issue and exercises "due care" with respect to that contamination, including the taking of precautions against "foreseeable actions or omissions."

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The contiguous property exemption would be backed by a transferable covenant by the federal government not to sue the site owner and protection from suits for contribution pursuant to CERCLA section 113. Like the proposed limitations on federal enforcement discussed above, the contiguous property exemption is not crucial to solving the Brownfields problem and debate over it is likely to be contentious.

#### **Tax Incentive Bills**

The three Brownfields tax incentive bills pending in Congress are the Community Empowerment Act of 1997, sponsored by Sen. Carol Moseley Braun, D-IL; the Brownfields Remediation and Economic Development Act of 1997, sponsored by Rep. Jack Quinn, R-NY; and the Brownfields Redevelopment Act of 1997, sponsored by Rep. William Coyne, D-PA.

The Moseley-Braun Bill would make "qualified" cleanup expenses fully deductible in the year in which they were incurred as long as the site at which they were incurred was in an area targeted for the encouragement of economic activity.

The Quinn bill would allow the use of pre-tax dollars to pay environmental assessment and cleanup costs. The Coyne bill would allow a 50-percent tax credit for cleanup costs incurred at a "qualifying" site pursuant to a federal or state approved cleanup plan. The Coyne bill would also permit the use of federal redevelopment bonds to finance cleanup costs.

Despite the broad consensus

between Democrats and Republicans on key Brownfields issues, federal Brownfields reform has been held up for years because of other disagreements about the future of the Superfund program.

The Republican leadership, particularly in the Senate, has insisted that Brownfields issues be addressed only as part of a complete overhaul of Superfund.

Sellers and potential purchasers of Brownfields sites, the communities in which those sites are located, and the environment would be better served if Congress enacted those reforms on which there is consensus now.

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