

**ENVIRONMENTAL CONTAMINATION: WHAT GENERAL CONTRACTORS NEED TO KNOW  
PART I OF III (Excerpt from "AGC's Environmental Observer," Issue 7-02, August/September 2002)**

**The Small Business Liability Relief and Brownfields Revitalization Act Offers Benefits to General Contractors.** The Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act) provides general contractors and other companies with important benefits by limiting traditional liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund). The Brownfields Act also provides funding to redevelop brownfield sites. This article briefly discusses the portions of the Brownfields Act that may be applicable to general contractors.

**What Is Traditional Superfund Liability?** Generally speaking, the following groups, called Potentially Responsible Parties or PRPs, may be responsible to pay for or perform Superfund cleanups: 1) current owners or operators of a contaminated facility; 2) past owners or operators of a contaminated facility at the time hazardous substances were disposed; 3) generators of hazardous substances found at the site; and 4) transporters that sent waste to the contaminated facility. Depending on the circumstances, general contractors could fall in any of these four categories.

**What Liability Reforms Are in the Brownfields Act?** If certain conditions are satisfied, the Brownfields Act exempts companies that disposed of municipal solid waste or *de micromis* quantities of hazardous substances from Superfund liability. It also exempts certain new owners of contaminated property from Superfund liability.

a. **Municipal Solid Waste Exemption:** Generally, this exemption applies to companies that send waste to a listed Superfund (called an NPL) site. To take advantage of this exemption, the general contractor must be a "small business" as described in the Brownfields Act and the waste must be essentially the same as residential waste. General contractors also must satisfy certain other conditions identified in the statute to take advantage of this exemption.

b. **De micromis Exemption:** This exemption applies to people that send less than 110 gallons of liquid material or less than 200 pounds of solid material containing hazardous substances to an NPL site, if some of that material was disposed before April 1, 2001. However, this exemption is unavailable if the material significantly complicates the cleanup (for example, the material requires a special remediation technology) or other conditions identified in the statute are not satisfied.

c. **Prospective Purchaser Exemption:** The Brownfields Act also contains a prospective purchaser liability exemption that applies to new owners of contaminated property. Basically, this exemption allows a purchaser to

avoid Superfund liability if, among other things: 1) the property was purchased after January 11, 2002 and all of the hazardous substances were disposed of prior to purchase; 2) prior to purchase, the buyer made all appropriate inquiries into the previous ownership and uses of the property; and 3) the purchaser is not potentially liable for the cleanup and is not affiliated with someone who is. If a contractor purchases contaminated property for development, this exemption provides a shield from Superfund liability so long as the contractor complies with these and other conditions identified in the Brownfields Act. However, contractors must be aware that this provision allows the United States to obtain a lien on the purchased property—or other property owned by the purchaser with the owner's agreement—for unrecovered response costs incurred by the United States if the cleanup results in an increase in the property's fair market value.

**Improving Brownfields Redevelopment.** Another provision of the Brownfields Act concerns revitalization funding for brownfield sites. This provision also may assist general contractors.

a. **What Are Brownfield Sites?** A "brownfield site" is real property whose redevelopment is complicated by the presence or potential presence of pollution. However, all contaminated sites are not "brownfield sites." Brownfield sites do not include, among others, NPL sites, sites subject to court or administrative orders, hazardous waste corrective action sites, and leaking underground storage tank sites.

b. **Who Can Receive Funding?** States, local governments, and Indian tribes can receive grants to inventory, characterize, assess, and cleanup brownfield sites. In addition, nonprofit organizations also can receive grants to cleanup brownfield sites. Because these grants must go to governmental or nonprofit organizations, general contractors would have to work with or through appropriate organizations to take advantage of this provision.

*If you have any questions, would like a copy of the statute, or would like additional information on Superfund, hazardous waste, or Brownfields matters, please contact the author of this article, Michael T. Scanlon, Esq., Barnes & Thornburg, at (317) 231-7387 or via e-mail at michael.scanlon@btlaw.com.*

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