

Expert Analysis

Environmental Due Diligence Standards: Present and Future

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The first half of 2013 has experienced greater economic activity than in recent years. The housing market appears to be recovering, albeit slowly. More lending and transactional activity is occurring at the commercial level. Concurrent with these general improvements in the overall economy are developments impacting environmental due diligence requirements. This commentary briefly discusses several such due diligence developments. Specifically, it reviews recent Environmental Protection Agency guidance on the bona fide prospective purchaser, or BFPP provisions as related to tenants and vapor intrusion, and the proposed changes to the American Society for Testing and Materials for Phase I Environmental Site Assessments. This commentary also discusses the impact of a recent appellate court ruling on continuing obligations required to avail of the BFPP protections.

In December 2012 the EPA issued guidance designed to help manage environmental liabilities and develop closure strategies for contaminated sites.¹ The agency notes that Section 107(r) of the Comprehensive Environmental Response, Compensation, and Liability Act² provides an important liability protection for parties who qualify as bona fide prospective purchasers. The guidance discusses the potential applicability of the BFPP provision to tenants who lease contaminated or formerly contaminated properties, and how the agency intends to exercise its enforcement discretion. Notably, this guidance super-sedes the EPA's Jan. 14, 2009, guidance titled "Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants."

The BFPP defense stems from the 2002 CERCLA brownfields amendments.³ Congress added the BFPP exception "to promote the cleanup and reuse of brownfields."⁴ The BFPP defense applies only to federal CERCLA claims and allows a prospective purchaser of a known contaminated property to avert potential CERCLA liability, provided designated steps are taken.

Prior to the brownfields amendments, one of the few defenses available to a potentially responsible party was the "innocent owner" defense, which applied only to an owner who "did not know and had no reason to know" about the contamination when the property was acquired.⁵ The brownfields amendments added the BFPP

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defense, which, for the first time, made it possible for a purchaser of contaminated property to avoid liability even when the purchaser knew the site was contaminated. To qualify for this defense, a BFPP must acquire the property after Jan. 11, 2002; cannot impede the performance of a response action or natural resource restoration; and must prove eight criteria by a preponderance of the evidence that demonstrate that the BFPP has:

- Shown all hazardous waste disposals at the facility predate the BFPP's ownership.
- Made all appropriate inquiries into the site's history.
- Provided all appropriate notices regarding any discovered contamination.
- Exercised "appropriate care" with respect to hazardous substances found at the facility by taking reasonable steps to contain and prevent contamination.
- Fully cooperated with all authorized remediation personnel.
- Complied with all required institutional controls.
- Responded to all subpoenas and information requests.
- Is not affiliated with any prior owner or operator.⁶

Failure to prove by a preponderance of the evidence even one of these criteria prevents a purchaser from successfully asserting the BFPP defense. A recent federal appellate decision emphasizing this point is discussed further below.

Although EPA's 2009 guidance indicated that a tenant could become a BFPP when its lease contained sufficient indicia of ownership for the tenant to be considered an "owner" and when a landlord of the tenant was itself a BFPP, the 2012 guidance makes two significant changes.

First, the 2012 guidance contains expanded enforcement discretion regarding tenants who derive BFPP status from their landlord. Importantly, the 2012 guidance states that, if an owner is a BFPP, a tenant can derive BFPP status by complying with the other requirements for the defense (with the exception of performing the inquiries into site history). Significantly, the tenant can maintain this defense even if the landlord loses its BFPP status. Second, the 2012 BFPP guidance confirms that the EPA, through its enforcement discretion, can consider a tenant BFPP exempt, despite an owner never becoming a BFPP, if the tenant satisfies all of CERCLA's BFPP requirements.

The 2012 guidance benefits tenants and landlords by providing a mechanism for tenants to obtain liability protection under CERCLA. Given the EPA's clarification, prospective tenants and landlords of potentially contaminated sites should carefully consider and work together to qualify for and maintain BFPP treatment. If the landlord is not a BFPP, then a tenant should undertake all appropriate inquiries. Further, to ensure each party can maintain its BFPP status, both landlords and tenants should be proactive in disclosing and taking appropriate remedial actions if subsequent releases of hazardous substances are discovered at the property.

The "all appropriate inquiries" criterion can currently be met by complying with the EPA's inquiry rule, which incorporates the Standard Practice for conducting a Phase I Environmental Site Assessment (or ASTM E 1527-05). American Society for Testing and Materials standards sunset after eight years, however, and as discussed further below, ASTM will publish a new standard later this year. Compliance with that standard will likely be required to successfully conduct all appropriate inquiries.

NEW EPA VAPOR INTRUSION GUIDANCE

Vapor intrusion refers to the migration of volatile chemicals from contaminated groundwater or soil into an overlying building. Vapor intrusion can occur in residential, commercial and industrial buildings with any foundation type.

On April 16, 2013, the EPA published a final draft version of its long-awaited vapor intrusion guidance to ensure exposure assessment and mitigation actions are consistently conducted. The EPA actually published two guidance documents: broad vapor intrusion guidance from the Office of Solid Waste and Emergency Response,⁷ and another from the Office of Underground Storage Tanks on petroleum hydrocarbons such as gasoline, diesel and jet fuel.⁸

The EPA believes assessing the potential for petroleum vapor intrusion is an integral part of the response to a suspected or confirmed release from an underground storage tank. At any leaking site, it is important to have a thorough understanding of the release — such as the source, composition and magnitude — and other factors that may influence the migration of contaminants and the impact on human health.

The EPA's draft guidance emphasizes the risk to the health of the occupants, including residents, workers and visitors in impacted buildings. The agency maintains that vapor intrusion is a potentially significant cause of human exposure to volatile hazardous chemicals in indoor spaces, generally via inhalation. The EPA has been operating with a draft vapor intrusion guidance from 2002, which was never finalized.

The EPA's revised guidance applies to the investigation and remediation at CERCLA and Resource Conservation and Recovery Act⁹ sites to address vapor migration into on-site buildings and neighboring structures. The EPA will require evaluation of the potential for human health risk from vapor intrusion throughout the cleanup process, including the initial site assessment, site investigation, interim response actions, final cleanup actions and periodic reviews of the selected cleanup plan. The EPA also set forth revised toxicity values, additional measures for preemptive action and mitigation system standards. Similarly, the related petroleum guidance outlines requirements for managing petroleum vapors.

These new vapor intrusion guidance protocols are expected to impact ongoing investigation and remedial considerations at many current Superfund sites. Also, it is anticipated that the EPA could require additional soil and groundwater cleanup at completely remediated sites as part of its "five-year review" process.¹⁰

Of particular note, the EPA specifically recommends that vapor intrusion risks be evaluated for reasonably expected future land use conditions, including new building construction and new uses and occupants for uninhabited buildings.¹¹ Consequently, it is conceivable that vapor intrusion evaluation may be required for almost every future transaction. In that regard, the American Society for Testing and Materials is considering changes to its Phase I ESA standard, discussed further below.

REVISED ASTM STANDARD

The ASTM first developed its Phase I Environmental Site Assessment in 1993 to address the scope of environmental due diligence required to avail of the innocent purchaser defenses found in state and federal Superfund laws. Further modifications were made in 1997 and 2000. The last revision occurred in 2005, in part to reflect the brownfields amendments, and it will expire this year.

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The primary proposed changes to the ASTM's Phase I standard include simplification of the definition of "recognized environmental conditions," new vapor migration guidelines, clarification of regulatory file review expectations, and updated user responsibilities.

The proposed change to the identification of recognized environmental conditions involves simplifying the definition of a REC, revising the definition of historic RECs and creating a new definition for controlled RECs. The redefined historic REC will specify that the environmental professional must determine if past releases addressed to the satisfaction of a regulatory agency are RECs at the time of the Phase I due to changes in regulatory criteria. The proposed controlled REC will provide a category for RECs that have been addressed to regulatory satisfaction with impacts left in place subject to the implementation of required controls, such as a deed restriction, engineering control or institutional control.

Importantly, the ASTM's inclusion of vapor migration screening is expected to significantly impact how surrounding properties are evaluated in their potential for impact to the subject property. The ASTM previously established standard E2600-10, Standard Guide for Vapor Encroachment Screening on Property Involved in Real Estate Transactions, as a standard by which to ascertain which surrounding properties may be impacting the vapor migration on subject properties. This existing standard will likely be the referenced document for addressing vapor intrusion issues as part of the E 1527-13 process. Properties up to one-third mile in certain directions from the subject property may be identified as potential sources of vapor concerns. The final standard is expected to allow the environmental professional to use discretion in the implementation of the screening process. Once the standard is finalized, it is likely the scope of some environmental due diligence projects will grow, and so too will the costs and time involved.

ASHLEY II: BFPP AND APPROPRIATE CARE

Against this backdrop of evolving regulatory guidance and standards related to environmental due diligence requirements comes a recent decision from the 4th U.S. Circuit Court of Appeals affecting the BFPP defense, about which purchasers and tenants must be aware. On April 4, 2013, the 4th Circuit decision in *PCS Nitrogen Inc. v. Ashley II of Charleston* helped clarify the BFPP defense.¹² This decision is the first time a federal appellate court has ruled on the requirements of the BFPP defense, and it exemplifies the importance of taking appropriate and prompt action to maintain eligibility for the defense.

Ashley II concerned a contaminated former fertilizer manufacturing facility outside Charleston, S.C. Ashley II of Charleston owned a portion of the site, incurred certain response costs and pursued a CERCLA cost recovery action against PCS Nitrogen; PCS counterclaimed for contribution. Ashley asserted the BFPP defense. The trial court rejected Ashley's defense because it failed to establish each of the eight required criteria — most notably, its failure to prove Ashley exercised appropriate care and took reasonable steps regarding the site's contamination.

On appeal, the 4th Circuit focused only on whether Ashley exercised appropriate care. The court said, "[b]ecause a party must establish all eight factors ... to qualify for the BFPP exemption from liability, [Ashley's failure to prove appropriate care was taken] mandates denial of Ashley's claim to BFPP exemption and affirmance of the district

court's holding that Ashley is a PRP [potentially responsible party] for the site as a current owner."¹³ The 4th Circuit did not discuss any of the other BFPP defense criteria.

The *Ashley II* court compared the standards required of innocent owners and those required of BFPPs, noting that the two provisions use similar language. The BFPP defense requires an owner to exercise "appropriate care," while the innocent-owner defense requires the owner to exercise "due care."¹⁴ The appeals court said, "Ashley fails to provide a persuasive rationale for requiring a lower level of 'care' from a BFPP ... than from an 'innocent owner.'"¹⁵ The 4th Circuit further said:

Logic seems to suggest that the standard of "appropriate care" required of a BFPP, who by definition knew of the presence of hazardous substances at a facility, should be higher than the standard of "due care" required of an innocent owner who by definition "did not know and had no reason to know" of the presence of hazardous substances when it acquired the facility.¹⁶

Ultimately, the 4th Circuit declined to rule whether a BFPP's standard of "appropriate care" is actually greater than an innocent owner's standard of "due care."¹⁷ Instead, the court held that "'appropriate care' under [the BFPP defense] is at least as stringent as 'due care' under [the innocent owner defense]."¹⁸

The trial court concluded that Ashley did not exercise appropriate care because reasonable steps were not taken. Specifically, Ashley "failed to clean out and fill in sumps that should have been capped, filled or removed when related aboveground structures were demolished, and that Ashley did not monitor and adequately address conditions relating to a debris pile and limestone run of crusher cover on the site."¹⁹

Applying the same standard of care and reasonable steps as required of innocent owners, the 4th Circuit agreed with the trial court that Ashley's delay in filling the sumps demonstrates that reasonable steps were not taken to prevent any threatened future release.²⁰ The appeals court affirmed the trial court's ruling that Ashley did not qualify for the BFPP defense and, as current owner, was a potentially responsible party.²¹

Simply put, *Ashley II* clarifies that an owner must take appropriate care to protect against a past release and prevent any threatened future release. It is a fact-intensive inquiry as to whether an owner took all precautions as a similarly situated reasonable and prudent person. Those seeking BFPP protections in 2013 are encouraged to be mindful of this decision and to follow the other regulatory developments discussed above.

NOTES

¹ U.S. Env'tl. Protection Agency, Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision (Dec. 5, 2012), *available at* <http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012.pdf>.

² 42 U.S.C. § 9601.

³ Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub L. No. 107-118, 115 Stat. 2356.

⁴ *Id.*

⁵ 42 U.S.C. § 9601(35)(A)(i).

⁶ *Id.* § 9601(40)(A)–(H).

⁷ U.S. Env'tl. Protection Agency, OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air (External Review Draft) (April 2013),

available at <http://www.epa.gov/oswer/vaporintrusion/documents/vaporIntrusion-final-guidance-20130411-reviewdraft.pdf>.

⁸ U.S. Env'tl. Protection Agency, Guidance for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites (April 2013), available at <http://www.epa.gov/oust/cat/pvi/petroleum-vapor-intrusion-review-draft-04092013.pdf>.

⁹ 42 U.S.C. § 6901.

¹⁰ 42 U.S.C. § 9621(c).

¹¹ U.S. Env'tl. Protection Agency, OSWER Final Guidance, at 17.

¹² *PCS Nitrogen Inc. v. Ashley II of Charleston*, 714 F.3d 161 (4th Cir. Apr. 4, 2013).

¹³ *Id.* at 181.

¹⁴ Compare 42 U.S.C. § 9607(r)(1) with § 9607(b)(3).

¹⁵ *Ashley II*, 714 F.3d at 180.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 180–81.

¹⁹ *Id.* at 180.

²⁰ *Id.* at 180–81.

²¹ *Id.* at 181.



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