EPA Issues Guidance Interpreting Scope of New CERCLA Defenses

By Larry Schnapf

Since the passage of the Small Business Liability Relief and Brownfields Revitalization Act ("2002 CERCLA Amendments"),[1] the United States Environmental Protection Agency ("EPA") has issued a number of guidance documents to clarify the scope and application of certain liability exemptions of the 2002 CERCLA Amendments.[2] This article will discuss the "*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 Guidance") issued by EPA on March 6, 2003.

I. Overview of Landowner Defenses

Title II of the 2002 CERCLA Amendments[3] added the Bona Fide Prospective Purchaser ("BFPP")[4] and Contiguous Owner defenses[5] and modified the Innocent Purchaser Defense[6]. It should be noted that the foregoing defenses only immunize an owner from CERCLA liability. The 2002 CERCLA Amendments do not protect a BFPP, Innocent Purchaser or Contiguous Property Owner from EPA actions brought under RCRA 7003, citizen suits brought under RCRA 7002, and RCRA corrective action orders. In addition, the defenses do not apply to actions brought under state or common law.

A. Innocent Purchaser Defense

Prior to the 2002 CERCLA Amendments, landowner had to establish by a preponderance of the evidence that it did not know and had no reason to know that any hazardous substances were disposed of at the facility to invoke the "innocent purchaser" defense.[7] In addition, a party qualifying as an innocent purchaser had to comply with the due care and precautionary requirements of the third party defense.[8]

The 2002 CERCLA Amendments established standards for what constituted an "appropriate inquiry"[9] and also added the following new obligations that a purchaser must comply with *after acquiring the property* to preserve its status as an innocent purchaser:

- Cooperate, assist, and provide access to persons that are authorized to conduct response actions or natural resource restoration at the property.[10]
- Comply with any land use restrictions established or relied on in connection with the response action at a vessel or facility and must not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action,[11] and.
- Provide access to persons authorized to conduct response actions at the facility to operate, maintain or otherwise ensure the integrity of land use controls that may be a part of a response action. [12]
- Take reasonable steps to stop any continuing release prevent any future

release, and prevent or limit any human, environmental or natural resources exposure to previously released hazardous substances.[13]

Thus, after the 2002 CERCLA Amendments, a person qualifying for the innocent purchaser defense not only has to exercise due care but must now also take "reasonable steps" regarding pre-existing contamination to establish that it undertook an appropriate inquiry. Is the requirement to take “reasonable steps” a different standard than having to exercise due care? On the surface, there would not seem to be much of a difference. If not, why did Congress use a different phrase? The case law on what constitutes "due care" is murky enough and this new obligation to take reasonable steps can only add further complicate the task of the environmental law trying to advise a client on how it may maintain its status as an innocent purchaser.

Further confusing matters is the fact that the "reasonable steps" obligation for the innocent landowner is in the section of that defense defining what constitutes "reason to know."[14] Does this mean that it will not be enough to conduct a Phase I ESA to qualify for the for the defense? The answer is unclear. It certainly does not make sense that a landowner who "had no reason to know" about contamination would have an obligation to take reasonable steps to stop any release it had no to reason to know about and that was occurring on or prior to the time it acquired the property. Of course, logic or fairness have not played a large role in the CERCLA liability scheme.

Then, of course, there is the issue of what constitutes a "continuing release" or a "threatened release." By definition, the innocent purchaser must take title after the "disposal or placement of the hazardous substances on, in, or at the facility." [15] It would seem that the new "reasonable steps" obligations would have to refer to "passive migration" since any on-going release would vitiate the defense.[16]

Clearly, the meaning of "reasonable steps" and "continuing release" required some further elaboration for clarification from EPA. The problem as we will see, is that the Common Elements Guidance does not shed much light on these issues.

B. The Bona Fide Prospective Purchaser Defense

The principal drawback of the CERCLA innocent purchaser defense has been that for a landowner to successfully assert the defense, it had to establish that it had “no reason to know” that the property was contaminated. Since the problem with brownfields is the existence or suspicion of contamination, the defense was largely unavailable to prospective developers or tenants of brownfield sites.

To eliminate this obstacle to redevelopment of brownfields, the 2002 CERCLA Amendments created the BFPP defense. [17] Under the new defense, landowners or tenants who knowingly acquire or lease contaminated property after January 11, 2002 can avoid CERCLA liability if they can establish the following conditions by a preponderance of the evidence that:

- All disposal of hazardous substances occurred before the purchaser acquired the facility.[18]
- The purchaser conducted an “appropriate inquiry” (see above)[19]

- The purchaser complied with all release reporting requirements.[20]
- The purchaser took "*appropriate care*" by taking by taking reasonable steps to stop any continuing release, prevent any threatened future release; and prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.[21]
- The purchaser cooperates, assists, and provides access to persons that are authorized to conduct response actions or natural resource restoration at the property. [22]
- The purchaser complies with any land use restrictions established as part of response action and does not impede the effectiveness or integrity of any institutional control used at the site.[23]
- The purchaser must also provide access to persons authorized to conduct response actions to operate, maintain or otherwise ensure the integrity of land use controls at the site.[24]
- The purchaser complies with any EPA request for information or administrative subpoena issued under CERCLA.[25]
- The purchaser must establish that it is not a PRP or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP.[26]

While the BFPP is also obligated to take "reasonable steps", the statutory language adds an additional condition by requiring the BFPP to exercise "appropriate care". It is not entirely clear what Congress intended when it used the term "appropriate care." Was this a drafting error or was Congress intending the BFPP to have a different responsibility than either the Innocent Landowner or the Contiguous Property Owner? One might suggest that the "appropriate care" standard might be more stringent than the "due care" requirement since there would be no reason to create this requirement if it was not a higher standard. suffers from the same is required test. Indeed, one of the EPA drafters of the Common Elements Guidance suggested at a recent conference that the BFPP arguably has greater responsibility than an Innocent Purchaser because the BFPP knows about the contamination.[27]

C. Contiguous Owner Defense

The CERCLA definition of a "facility" includes any area where hazardous substances have come to be located. As a result, property owners have been concerned that they could be held liable for contamination that has migrated onto their property from an adjoining parcel. This potential liability has discouraged development of brownfield sites. To eliminate these disincentives, EPA published its "Final Policy toward Owners of Property with Contaminated Aquifers" in 1995.[28]

The 2002 CERCLA Amendments added the Contiguous Owner Defense that codifies some of the elements 1995 EPA policy as an affirmative defense.[29] The new defense provides that a person owning property that is contiguous to or otherwise similarly situated to a contaminated site and that is or may be contaminated by a release

or threatened release of a hazardous substance from that contaminated site shall not be considered to be a CERCLA owner or operator solely by reason of the contamination if it can satisfy the following conditions by a preponderance of the evidence:

- The owner has not caused, contributed, or consented to the release or threatened release;[30]
- The owner it is not a PRP or affiliated with any other PRP for the property through any direct or indirect familial relationship, a contractual or corporate relationship, or the result of a reorganization of a business entity that was a PRP.[31]
- The owner takes reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to any hazardous substance released on or from property owned by that person;[32]
- The owner cooperates, assists, and provides access to persons that are authorized to conduct response actions or natural resource restoration at the property;[33]
- The owner complies with any land use restrictions established as part of response action at the site and does not impede the effectiveness or integrity of any such institutional control. In addition, the owner must provide access that is necessary to allow persons authorized to conduct response actions to operate, maintain or otherwise ensure the integrity of land use controls.[34]
- The owner must comply with all release reporting requirements and other required notices regarding the discovery or release of any hazardous substances at the facility;[35]
- The owner has complied with any EPA request for information or administrative subpoena issued under CERCLA;[36] and
- The owner conducted an "appropriate inquiry" at the time the person acquired title to the property and did not know or have no reason to know that the property was or could be contaminated by a release or threatened release of 1 or more hazardous substances from other real property not owned or operated by the person.[37]

Since this is an affirmative defense, the landowner has the burden of establishing by a preponderance of the evidence that it has satisfied these conditions. If an owner cannot qualify for the contiguous property owner defense because for example it did not conduct an appropriate inquiry, it may still be able to qualify for the BFPP defense. [38]

A person qualifying as a contiguous property owner is not required to conduct ground water investigations or to install ground water remediation systems unless it would otherwise be required to conduct such activity under the EPA 1995 policy.[39] The contiguous property owner may also assert any other defense to liability that may be available under any other law [40]

Some might argue that this defense actually expands the liability of those contiguous property owners. It has been a rare instance when a property owner whose

property has been impacted by a plume migrating from an off-site source has been held liable under CERCLA. The intent of the 1995 EPA policy was to eliminate barriers to the transfer of property. Under the policy, an owner or lessee of property with contaminated groundwater from an off-site source would not be liable if it did not cause or exacerbate the contamination. The owner or lessee was also not required to take any affirmative actions to investigate or remediate the groundwater contamination to satisfy the "due care" or "precautionary" elements of the third party defense.[41] Indeed, when PRPs have been required to install monitoring wells on contiguous property or otherwise gain access to such property, they often have been required to pay the owner for such access as part of the PRPs' good faith obligation under a CERCLA administrative order on consent.

However, the defense now requires that the contiguous property owner to take "reasonable steps" to preserve its defense, something it was not required to do before the 2002 CERCLA Amendments. If an owner or lessee fails to carry out these new responsibilities, there is an implication that the contiguous owner or lessee may be liable under CERCLA as the owner of a facility where hazardous substances have come to be located. Of course, the owner or lessee of a property that is adjacent to a contaminated site can always assert the Third Party defense.[42]

II. Common Elements Guidance

The Common Elements Guidance only addresses 5 of the criteria that a landowner must meet to qualify for these defenses. These criteria are:

- compliance with land use restrictions requirement;
- Taking "reasonable steps" for hazardous substances affecting the property;
- the requirement to cooperate and provide assistance or access to parties implementing remedies,
- complying with information requests, and;
- providing all required notices.

The guidance does not address the requirement that the landowner not contribute or cause a release, and the landowner acquire the property after the disposal of hazardous substances. Moreover, the guidance does not any obligations landowners may have under state or common law.

A. Threshold Criteria

The guidance identifies two initial "threshold criteria" that a party must satisfy at the time it takes title or possession of the property. The guidance then discussed five "Continuing Obligations" that landowners or occupiers must continue to satisfy to maintain their immunity from liability.

1. Appropriate Inquiry

The first threshold criteria is that the landowner conduct "appropriate inquiry". The 2002 CERCLA Amendments established interim standards for satisfying the appropriate inquiry" of the three landowner defenses. EPA is required to promulgate

permanent standards by January 11, 2004.[43]

For commercial property purchased before May 31, 1997, the 2002 CERCLA Amendments provide that courts shall continue to use the statutory factors contained in the innocent purchaser's defense prior to the 2002 CERCLA Amendments.[44] For commercial property purchased on or after May 31, 1997 and until EPA promulgates its due diligence standards, owners or tenants may satisfy the appropriate inquiry requirement by performing a Phase I environmental site assessment ("ESAs") in accordance with *"the procedures of the American Society for Testing and Materials ("ASTM"), including the document known as the Standard 'E1527-97', entitled Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process."* [45]

The 2002 CERCLA Amendments create a more relaxed standard of due diligence for non-governmental or non-commercial purchasers of residential property or similar use. These purchasers may qualify as an innocent purchaser or BFPP by conducting a site inspection and title search that reveal no basis for further investigation.

The Common Elements Guidance emphasizes that potential purchasers or occupiers of property who wish to avail themselves of the landowner defenses must perform all of their "appropriate inquiry" prior to taking title or possession of the property. The guidance also reaffirms that while a BFPP may acquire contaminated property with knowledge of the contamination, it must still perform an appropriate inquiry. Of course, a party who knows or has reason to know of contamination will not be eligible for the contiguous property owner or innocent landowner liability protections.[46]

2. No Affiliation with PRP

This criterion provides that a party must not be potentially liable or affiliated with a potentially responsible party any other person who is potentially liable for response costs. The guidance acknowledged that 2002 CERCLA Amendments did not define the phrase "affiliated with," but that appears that Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity.

The guidance also noted that the Innocent Purchaser defense did not contain any "affiliation with" language but did require that a person must establish by a preponderance of the evidence that the act or omission that caused the release or threat of release of hazardous substances and the resulting damages were caused by a third party with whom the person does not have an employment, agency, or contractual relationship.

The BFPP defense is available to a tenant who satisfies the elements of the BFPP defense. However, what about the tenant who leases contaminated property after the enactment of 2002 CERCLA Amendments from a pre-enactment landlord who does not qualify for the BFPP defense? Since a BFPP cannot be affiliated with a PRP, does the existence of the lease create a sufficient "affiliation" that would bar the post-enactment tenant from qualifying for the defense? Both the legislative history and the guidance are silent on this issue.

The statutory language states that the person cannot be affiliated with a PRP through " any contractual, corporate, or financial relationship (other than a contractual,

corporate or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services)..”[47] It would seem that the language could cover a bank whose borrower was responsible for contamination. However, the existence of the lease with the PRP landlord might preclude a tenant from asserting the defense.

In the guidance document, EPA suggested that "affiliation" could be broadly interpreted but suggested that Congress intended to prevent a party from contracting away its liability through a transaction with a family member or related corporate entity. Yet, a high-ranking EPA official who was involved in the drafting of the document indicated at a conference chaired by this author that a post-enactment tenant would not be able to avail itself of the BFPP defense if it was leasing the property from a pre-enactment owner who was a PRP. [48]

Such an interpretation would seem to violate the spirit of the 2002 CERCLA Amendments. Congress chose to use the term "affiliation" instead of the "contractual relationship" language of the third party defense. The courts have generally broadly construed the meaning of "contractual relationship" so that the defense has been largely unavailable purchasers or tenants of previously-contaminated property. Indeed, it was the harsh application of this language that led Congress to add the innocent purchaser's defense in 1986.[49] Since the principle purpose of the 2002 CERCLA Amendments was to eliminate the legal obstacles for redeveloping contaminated properties, it would make sense that Congress would use a term that would not sweep into the CERCLA liability net the very parties that hoped would re-use brownfield sites while at the same time making sure that PRPs did not avoid liability through corporate machinations. Therefore, it would appear that post-enactment tenants of pre-enactment PRP landlords should be able to qualify for the BFP or Contiguous Owner defenses provided they comply with their rest of the elements of those defenses.

B. Continuing Obligations

If a party satisfies the Threshold Criteria, it must then comply with the “Continuing Obligations” to maintain its immunity from liability.

1. Land Use Restrictions and Institutional Controls

In qualify for the bona fide prospective purchaser, contiguous property owner, or innocent landowner, a party may not impede the effectiveness or integrity of any institutional control employed in connection with a response action.[50] The Common Elements Guidance indicated that the 2002 CERCLA Amendments require a BFPP, contiguous property owner, and innocent landowner to comply with land use restrictions relied on in connection with the response action even if the institutional controls were not in place at the time the person purchased the property or have not been properly implemented. [51]

According to the Common Elements Guidance, a land use restriction may be considered “relied on” when the restriction is identified as a component of the remedy.[52] EPA noted that an institutional control may not serve the purpose of implementing a land use restriction if it was not implemented, the party responsible for enforcement of the

institutional controls neglects to take sufficient measures to bring those persons into compliance; or a court finds the controls to be unenforceable.

For example, a remedy might rely on an ordinance that prevents groundwater from being used as drinking water but the local government may fail to enact the ordinance, change the ordinance to allow a use prohibited by the remedy (e.g., drinking water use), or failed to enforce the ordinance. In such circumstances, the guidance indicates that a landowner or person using the property will still be required to comply with the groundwater use restriction to maintain its liability protection.[53] If the owner/operator fails to comply with a land use restriction relied on in connection with a response action, the EPA indicated that it may use its CERCLA authority to order the owner to remedy the violation or may remedy the violation itself and seek cost recovery from the owner/operator.[54]

The guidance suggests that a party could be deemed to be "impeding the effectiveness or integrity of an institutional control "without actually physically disturbing the land. Examples cited by EPA included removing a notice that was recorded in the land records, by failing to provide a required notice of the existence of institutional controls to a future purchaser of the property, and by applying for a zoning change or variance when the current designated use of the property was intended to act as an institutional control.

However, EPA did acknowledge that some institutional controls may not need to remain in place in perpetuity. Thus, an owner may seek to change land use restrictions and institutional controls that were used in connection with a response action provided it follows procedures required by the applicable regulatory agency. For example, if there are changed site conditions such as natural attenuation of groundwater contamination, the need for institutional controls may be obviated. Finally, an owner who believes changed site conditions warrant a change in land or resource use can always perform additional response actions that would eliminate the need for the particular institutional controls. However, EPA cautioned that the owner should review and follow the appropriate regulatory agency procedures prior to undertaking any action that may violate the requirements of this provision. [55]

2. Taking Reasonable Steps

As mentioned earlier, one of the most vexing issues of the 2002 CERCLA Amendments is the meaning of "taking reasonable steps" and the phrase fits into the other standards of care that CERCLA imposes on landowners and occupiers. The drafters of the Common Elements Guidance looked hard to find a common thread among the vague and inconsistent phraseology and should be commended for their hard work. Unfortunately, like the rest of CERCLA, the statutory provisions of the landowner defenses are not models of clarity and the guidance falls short of providing the precise guidelines on the kind of conduct that will help prospective purchasers and potential tenants minimize their CERCLA liability. The best that be said is that Congress clearly intended that a BFPP, contiguous landowner and innocent purchaser not ignore potential dangers associated with hazardous substances on its property.[56]

For example, the BFPP is required to exercise appropriate care (which includes taking reasonable steps) while the contiguous owner is only required to take reasonable

steps.[57]Moreover, as explained earlier, the innocent purchaser's reasonable steps obligation is buried within the provision defining what constitutes "reason to know."[58] Given this difficult task of reconciling the inconsistent language, EPA adroitly ignored these subtle language differences and focused on the fact that each defense required landowners or occupiers to take reasonable steps. In other words, the Common Element Guidance simply restated the test as requiring BFPPs, contiguous property owners, and innocent landowners to take “reasonable steps” with respect to hazardous substance releases to stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resource exposure to hazardous substance releases.

EPA did acknowledge that the due care language of the third party defense differed from the new reasonable steps language. However, the agency concluded that reasonable steps requirement is consonant with traditional common law principles and the existing CERCLA “due care” requirement. Therefore, the guidance suggests that the case law on due care could serve as a starting point for evaluating the reasonable steps requirement. However, clients do not want to know go on magical mystery tours. The guidance does frustratingly little to eliminate the liability uncertainty that has discouraged development of brownfields and contaminated sites.

Not surprisingly, the guidance states that a reasonable steps determination will be a site-specific, fact-based inquiry that will have to take into account the different elements of the landowner liability protections. The guidance also indicated the obligations may differ for landowners depending on the defense they are relying on because of the differences among the three statutory provisions.[59] For example, while each defense requires the owner/operator to conduct an "appropriate inquiry", only a BFPP may purchase with knowledge. Thus, the reasonable steps required of a BFPP may differ from those of the other protected landowner categories who did not have knowledge or an opportunity to plan prior to purchase. Indeed, a senior official of EPA suggested at a recent conference that the BFPP arguably has greater responsibility than an Innocent Purchaser because the BFPP knows about the contamination.[60] Once a contiguous property owner or innocent landowner learns that contamination exists on their property, though they must take reasonable steps considering the available information about the property contamination.[61]

The guidance did state that absent unusual circumstances, parties qualifying for the statutory defenses will not generally be required to perform full-fledged remedial actions provided that they are not responsible for the release.[62] However, they should take some affirmative steps to “stop the continuing release". In some instances, notice to appropriate governmental officials and containment or other measures to mitigate the release would probably be considered appropriate.[63] Thus, a contiguous property owner generally will not be required to conduct a groundwater investigation or install groundwater remediation system. [64]When there is an on-site well that could influence or affect migration of contaminants, EPA indicated that a site-specific analysis should be used in order to determine if additional reasonable steps may be necessary such as operation of the groundwater well consistent with the selected remedy.[65]

EPA also indicated that while a protected party discovering contamination may not be required to undertake a full environmental investigation, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient. [66]While the

need to perform an investigation may be lessened when the government is actively investigating the property, the guidance suggests that protected party should be careful not to rely on the fact that the government has been notified of a hazard on its property as a shield to potential liability where she fails to conduct any investigation of a known hazard on her property.[67]

EPA did state that there were some circumstances where the reasonable steps required of a party may be akin to those of a PRP such as when the only remaining response action is implementation and maintenance of institutional or engineering controls.[68] The guidance did suggest that this would most likely arise in the context of a BFPP since they would be purchasing the property with knowledge of the contamination.[69]

EPA provided some further illustrations of the scope of the reasonable steps requirement in Appendix B to the guidance. For example, the agency said that when a property owner discovers unauthorized dumping of hazardous substances on a portion of their property, restricting site access would be an appropriate first step that would qualify as reasonable steps.[70] If leaking drums are discovered on a property, EPA indicated that the drums should be segregated and the contents identified. [71]

A more complicated question involved discovery by a property owner that the containment system for an on-site waste pile has been breached. The guidance indicated that if the property owner had responsibility for maintaining the system as part of her property purchase, they should repair the breach. However, when another party assumed that responsibility (e.g., a prior owner or other liable parties that signed a consent decree with EPA and/or a State), the current owner should give notice to the person responsible for the containment system and to the government. Nevertheless, additional actions to prevent contaminant migration would likely be appropriate. [72]

Similarly, if a BFPP buys property where part of the approved remedy is an asphalt parking lot cap but the entity or entities responsible for implementing the remedy are unable to repair the deteriorating cap, EPA said the BFPP may be in the best position to identify and quickly take steps to repair the asphalt cap and prevent additional exposures.[73]

In some instances, a purchaser may agree to assume the obligations of a prior owner that are defined in an order or consent decree prior owner. The guidance suggests that compliance with the obligations of the order or consent decree will satisfy the reasonable steps requirement in most cases so long as the order or consent decree comprehensively addresses the obligations of the prior owner through completion of the remedy. [74]

A somewhat related issue is if a party can be deemed to have take “reasonable steps” if it complied with a state voluntary cleanup program that has a MOA with EPA or otherwise qualifies as a qualified state response program? The guidance did not address that issue though a senior EPA representatives who participated in the drafting of the guidance indicated at a recent conference that compliance with such a program would certainly be relevant in determining if reasonable steps were taken.

3. Cooperation, Assistance, and Access

The 2002 CERCLA Amendments require that bona fide prospective purchasers,

contiguous property owners, and innocent landowners provide full cooperation, assistance, and access to persons who are authorized to conduct response actions or natural resource restoration at the vessel or facility from which there has been a release or threatened release, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration at the vessel or facility. [75] The guidance simply repeats the statutory provision without providing any further clarification. [76]

As discussed earlier, a landowner who refuses to assist in the implementation of an institutional control employed in connection with the response action by not recording a deed notice or not agreeing to an easement or covenant might also be viewed as impeding the effectiveness or integrity of an institutional control but also failing to cooperate with a person authorized to conduct response actions.[77] It is unclear if a contiguous owner will now have to allow access to PRPs to conduct response actions in order to be deemed to meet this element of the defense. Moreover, can a contiguous property owner be able to demand compensation as a condition for access to the property? It is possible that a court may conclude that a contiguous property owner who denies access to PRPs to conduct response actions or refuses to allow institutional controls to be placed on property because of inadequate compensation may have not provided full cooperation, assistance and access to persons authorized to conduct response actions. This is another example where the statutory contiguous owner defense may be narrower than what was available under the 1995 policy.[78]

4. Compliance with Information Requests and Administrative Subpoenas

The 2002 CERCLA Amendments also require a BFPP and contiguous property owners to be in compliance with, or comply with, any request for information or administrative subpoena issued by the President under CERCLA.[79] In particular, EPA expects timely, accurate, and complete responses from all recipients of section 104(e) information requests. As an exercise of its enforcement discretion, EPA may consider a person who has made an inconsequential error in responding (e.g., the person sent the response to the wrong EPA address and missed the response deadline by a day), a BFPP or contiguous property owner, as long as the landowner also meets the other conditions of the applicable landowner liability protection. [80]

5. Providing Legally Required Notices

A BFPP and contiguous property owner are required to provide all legally required notices involving the discovery or release of any hazardous substances at the facility. [81] EPA indicated that the purpose of this requirement was to ensure that EPA and other appropriate entities are made aware of hazardous substance releases in a timely manner. The agency indicated that “legally required notices” may include those required under federal, state, and local laws. [82] A landowner may have multiple federal reporting obligations,[83] but according to senior EPA officials involved in the preparation

of the Common Element Guidance, there will not be a "one-stop shopping" mechanism for complying with these federal notice requirements. Thus, a landowner would not only have to make individual federal notifications for each response program having jurisdiction over the release but also complying with all individual state and local reporting requirements. The BFPP and contiguous property owner will have the burden of ascertaining what notices are legally required in a given instance and of complying with those notice requirements.

However, to try to ease the reporting burden obligation, the guidance indicated that regional offices may allow landowners to self-certify that they *have provided* (in the case of contiguous property owners), or *will provide* within a certain number of days of purchasing the property (in the case of bona fide prospective purchasers), all legally required notices. Such self-certifications may be in the form of a letter signed by the landowner as long as the letter is sufficient to satisfy EPA that applicable notice requirements have been met. [84]

Parties seeking to avail themselves of the landowner defenses are well advised to remember that the 2002 CERCLA Amendments do not have any mechanism for waiving technical violations of notification requirements nor is there any language suggesting that substantial compliance with notification requirements is adequate to assert these defenses. Thus, it is quite likely that PRPs filing a contribution action against a BFPP and contiguous property owners will not adopt the lenient approach of some state or federal regulators and will argue that the owner forfeited its immunity to liability because of the late notice

C. Future Assurances

EPA is also authorized to issue assurance to a contiguous property owner that no enforcement action will be initiated under CERCLA and to provide protection against claims for contribution or cost recovery.[85] The guidance presents some approaches that EPA may follow for certain kinds of sites.

For example, EPA said it may occasionally be willing to provide a comfort/status letter addressing reasonable steps at a specific site. However, the agency anticipates that these letters will be limited to sites with significant federal involvement where it has sufficient information to form a basis for suggesting reasonable steps (e.g., the site is on the National Priorities List or EPA has conducted or is conducting a removal action on the site). A EPA regional office may also conclude that it is not necessary to opine about reasonable steps because it is clear that the landowner does not or will not meet other elements of the relevant landowner liability protection. If EPA has taken some action at a site such as conducting a removal action but the state will be taking over the lead for the remedial action in the near future, EPA will coordinate with the state prior to issuing a comfort/status letter suggesting reasonable steps at the site.[86]

Conclusions-

EPA is to be commended for trying to make sense of dense and convoluted statutory language, and EPA staff have candidly admitted that the Common Elements Guidance is considered a work in progress that may continue to evolve as the agency gains experience with the new defenses.

While the document does provide some guidance to prospective purchasers and occupiers of contaminated sites, it really only answers the easy questions that were not real concerns to environmental lawyers and their clients. The key questions at the core of the landowner defenses such as what constituted reasonable steps remain largely undefined and this uncertainty will essentially vitiate the incentives for brownfield development that Congress had hoped to create when it created these defenses.

With over two decades of experience grappling with the requirements of the innocent landowner defense, the regulated community is probably comfortable dealing with the "threshold criteria". However, what environmental lawyers and their clients really need is more precise guidance on the ”Continuing Obligations", in particular what satisfies the "reasonable steps," "appropriate care" and "due care" requirements. Simply telling the regulated community to look at the "due care" case law is not helpful and does provide landowners or possessors much guidance on what they can do to preserve their defenses to liability.

What is needed is detailed regulations like the lender liability rule EPA promulgated in 1992. [87] There, EPA did not tell bankers to look at the case law for guidance but provided detailed criteria that clarified and specified the range of activities that lenders could take without forfeiting their immunity to liability. EPA should commence formal rulemaking to create a detailed rule that will define what constitutes "reasonable steps", "appropriate care" and "due care". Like the lender liability rule, it should be added to the National Contingency Plan ("NCP")[88]so that it would not only define the liability of landowners for actions filed by the United States but also third parties. Such private plaintiffs would have the burden of establishing that the landowner did not comply with the requirements of the rule.[89] This could minimize the possibility that third parties would bring CERCLA contribution or cost recovery actions against future purchasers and possessors. [90]

With adequate time and input from the regulated community, EPA could promulgate a rule that defines what constitutes "reasonable steps", "appropriate care" or "due care." One model for such a rule might be the "Due Care Requirements" promulgated by the Michigan Department of Environmental Quality ("MDEQ").[91] For example, the Due Care Rules require property owners or operators to

- **Prevent Exacerbation of Existing Conditions**- If a landowner or operator takes actions such as mishandling contamination soil, pumping groundwater from footings, creating new pathways of exposure by installing new utility lines or otherwise interfering with institutional or engineering controls that would increase the response costs to the liable party, the landowner/operator would be liable for the contamination they caused or the costs for the increased response action incurred by the responsible party;[92]
- **Preventing Unacceptable Human Risk-**Owners and operators must exercise due care by undertaking response activities that are necessary to

prevent unacceptable exposures to contamination. The existing contamination must be evaluated to determine if the people using or working at the property would be exposed to contamination at levels above the appropriate criteria. For example, if groundwater used for drinking is contaminated above the drinking water criteria, the owner and operator must provide an alternative water supply. If soils are contaminated above the direct contact criteria for the appropriate land use at the surface of the property**,** then people must be prevented from coming into contact with those soils by restricting access**,** installing a protective barrier, or removing contaminated soil. Protective barriers can be clean soil, concrete, paving, etc. In addition, if there is a potential unacceptable risk for utility workers or people conducting activities in an easement, then utility and/or easement holders must be notified in writing of the conditions by the owner or operator. If there is a fire and explosion hazard, the local fire department must be notified and the situation must be mitigated.[93]

- **Taking Reasonable Precautions-** Owners and operations must take reasonable actions against the reasonably foreseeable actions of a third party means to prevent persons from being exposed to an unacceptable risk. This might include notifying contractors of contamination so they can take proper precautions, preventing trespass that would result in an unacceptable exposure; securing abandoned containers so they do not deteriorate and cleaning up any spills from containers though the owner/operator is not required to empty abandoned or discarded underground containers. There are specific requirements for abandoned or discarded containers, USTs, abandoned or discarded ASTs, [94]
- **Due Care Documentation-** Owners and operators must maintain records documenting how they have complied with the due care requirements, including identifying the response actions taken. Require information includes identification of exposure pathways, estimates of concentrations of hazardous chemicals that persons may have been exposed to, description of response actions and evidence of compliance with any required remedial plan. However, documentation of obvious institutional controls such as fencing, pavement, signs, etc is not required.[95]
- **Notification to MDEQ and Other Parties**- Within 45 days of taking title or possession, or learning of the following conditions, owners or operators must notify MDEQ of discarded or abandoned containers that contain hazardous substances; notify MDEQ and adjacent property owners of contaminants migrating off the property; notify the local fire department if there is a fire or explosion; notify utility and easement holders if contaminants could cause unacceptable exposures and/or fire and explosion hazards.[96]

What is clear is that a BFPP, contiguous landowner and innocent purchaser could easily and inadvertently lose its immunity from liability after acquiring title or taking possession of contaminated property. As a result, prospective purchasers and potential

tenants are going to have to proactively work with environmental counsel earlier in transactions to map out strategies for maintaining their liability protection. These parties are also going to have to use devote more resources to conduct more thorough environmental due diligence so that the they can develop accurate estimates on the costs of implementing the "reasonable steps" and other elements of the defenses that will be necessary to preserve their defenses.

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[1] P.L. 107-118

[2] *Regional Determinations Regarding Which Sites are Not "Eligible Response Sites" under CERCLA Section 101(41)(C)(i), as Added by the Small Business Liability Relief and Brownfields Revitalization Act-(3/6/03); Bona Fide Prospective Purchasers and the New Amendments to CERCLA (5/31/02); Revised Settlement Policy and Contribution Waiver Language Regarding Exempt De Micromis and Non-Exempt De Micromis Parties (11/6/02); Superfund Recycling Equity Act of 1999: Factors to Consider in a CERCLA Enforcement Case* (8/31/02)

[3] Brownfields Revitalization and Environmental Restoration Act, P.L. 107-118, Tit. II

[4] 42 U.S.C. 9601(40)

[5] 42 U.S.C. 9607(q)

[6] 42 U.S.C. 9601(35)(A)

[7] 42 U.S.C. 9601(35)(A)(i)-(iii). To establish that it had no "reason to know" of the contamination, the landowner had to demonstrate that it took "*all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability*." In determining whether there was an "appropriate inquiry," CERCLA requires that any specialized knowledge or experience of the innocent owner must be taken into account as well as the relationship of the purchase price to the contaminated property and whether the presence of contamination was obvious or could be detected by an appropriate site inspection.

[8] Id. At 9607 (b) (3). The CERCLA third-party defense provides that a person may not be liable under CERCLA if it can establish by a preponderance of evidence that the release was SOLELY to the acts or omissions of a third party who was not an agent or employee of the defendant, the defendant did not have a direct or indirect contractual relationship with the third party, the defendant exercised due care in dealing with the hazardous substances and the defendant took precautions against foreseeable acts or omissions of any third party and the foreseeable consequences of those acts or omissions.

[9] 42 U.S.C. 9601(35)(B).

[10] 42 U.S.C. 9601(35)(A)(iii)

[11] Id.

[12] Id.

[13] 42 U.S.C. 9601(35)(B)(i)(II)

[14] 42 U.S.C. 9601(35)(B)(i)(II)

[15] 42 U.S.C. 9601(35)(A)

[16] At a recent conference of the ABA Section on the Environment, Energy and Resources, an EPA official who participated in the drafting of the Common Element Guidance indicated that EPA did not agree with those decisions that suggested there is liability for passive migration.

[17] 42 U.S.C. 9601(40)

[18] 42 U.S.C. 9601(40)(A)

[19] 42 U.S.C. 9601(40)(B)

[20] 42 U.S.C. 9601(40)(C)

[21] 42 U.S.C. 9601(40)(D)

[22] 42 U.S.C. 9601(40)(E)

[23] 42 U.S.C. 9601(40)(F)

[24] Id.

[25] 42 U.S.C. 9601(40)(G)

[26] 42 U.S.C. 9601(40)(H).

[27] While a BFPP is immune from CERCLA liability, the 2002 CERCLA Amendments create a windfall

lien in favor of EPA for property owned by a BFPP. 42 U.S.C. 9607(r). This lien is in addition to the non-priority lien provided in section 107(l) of CERCLA that EPA may impose on a property where it has performed response actions. 42 U.S.C. 9607(l). The lien becomes effective when EPA incurs response costs or notifies the owner of the property of its potential liability, whichever is later. Id. at 9607(2) (A)-(B). However, the lien is subject to the rights of holders of previously perfected security interests. Id. at 9607(l)(3). EPA is currently working on a windfall lien guidance document.

[28] 60 FR 34790 (July 3, 1995)

[29] 42 U.S.C. 9607(q)

[30] 42 U.S.C. 9607(q)(1)(A)(i)

[31] 42 U.S.C. 9607(q)(1)(A)(ii)

[32] 42 U.S.C. 9607(q) (1)(A)(iii). The statutory language does not refer to "appropriate care" but the standard is identical to the "appropriate care" provisions in the BFPP and innocent purchaser's defense.

[33] 42 U.S.C. 9607(q)(1)(A)(iv)

[34] 42 U.S.C. 9607(q)(1)(A)(v)

[35] 42 U.S.C. 9607(q)(1)(A)(vii)

[36] 42 U.S.C. 9607(q)(1)(A)(vi)

[37] 42 U.S.C. 9607(q)(1)(A)(viii).

[38] 42 U.S.C. 9607(q)(1)(C). Presumably, the owner or operator could also assert the third party defense for contamination migrating onto its site.

[39] Id. at 9607(q)(1)(D)

[40] Id. at 9607(q)(2)

[41] 42 U.S.C. 9607(b)(3)

[42] Presumably, such a party could assert both defenses as alternative pleadings.

[43] 42 U.S.C. 9601(35)(B).

[44] 42 U.S.C. 9601(35)(B)(iv)(I)

[45] 42 U.S.C. 9601(35)(B)(iv)(II). EPA recently issued a final rule clarifying that for property purchased on or after May 31, 1997, the "appropriate inquiry" requirement may be satisfied by complying with ASTM E1527-00. Recipients of brownfield assessment grants can satisfy their appropriate inquiry requirements by complying with either ASTM E1527-97 or E1527-00. 68 FR 24888, 89 (May 9, 2003).

[46] Common Elements Guidance at page 4.

[47] 42 U.S.C. 9601(40)(H)(II)

[48] Of course, the post-enactment tenant could try to assert the third party defense in those jurisdictions that narrowly construe the "contractual relationship" phrase contained in 42 U.S.C. 9607(b)(3).

[49] *Lefebvre v. Central Maine Pwr. Co., 7 F. Supp. 2d 64, 70 (D. Me. 1998).*The Innocent Purchaser defense (42 U.S.C. 9601(35)(A)) is actually a subset of the third party defense (42 U.S.C. 9607(b)(3)). The existence of a lease or a purchase agreement frequently prevented a party from asserting the third party defense because it was deemed to be in a contractual relationship with the PRP seller/lessor. *In re Hemingway Transport, Inc., 993 F.2d 915, 932 (1st Cir. 1993); Grand Street Artists v. Gen. Elec. Co., 28 F. Supp. 2d 291, 295-96 (D.N.J. 1998); United States v. Hooker Chemical & Plastics Corp., 680 F. Supp. 546 (W.D.N.Y. 1983)*The innocent purchaser defense provides that a party who conducts an appropriate inquiry and therefore has no reason to know of contamination is deemed not to have a "contractual relationship" with the PRP and therefore able to qualify for the defense provide it also satisfy the other elements of the defense. It should be noted that a minority of courts primarily locate in New York have looked at the purpose of the contractual relationship and where the contract was not for the purpose of handling or disposing wastes, the defendant was held not to be in a contractual relationship that would bar the defense. *N.Y. v. Lashins Arcade, 91 F.3d 353 (2d Cir. 1996); Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 964 F.2d 85 (2d Cir. 1992); Westwood Pharmaceuticals, Inc. v. National Fuel Gas Distribution Corp., 964 F.2d 85 (2d Cir. 1992)*

[50] 42 U.S.C. §§ 9601(40)(F)(ii), 9607(q)(1)(A)(v)(II), 9601(35)(A)(iii)

[51] Common Elements Guidance at page 6. Institutional controls are administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land or resource use. For example, an institutional control might prohibit the drilling of a drinking water well in a contaminated aquifer or disturbing contaminated soils. EPA typically uses institutional controls whenever contamination precludes unlimited use and unrestricted exposure at the property.

Institutional controls often need to remain in place for an indefinite duration and, therefore, generally must survive changes in property ownership to be effective. A property owner or operator usually has to take steps to implement the controls, such as conveying a property interest (e.g., an easement or restrictive covenant) to another party such as a governmental entity so that the party has a right to enforce the land use restriction, applying for a zoning change, or recording a notice in the land records. Id at 6-7.

[52] The land use restriction may be document in several places depending on the particular response program including in a risk assessment, remedy decision document (e.g., ROD), remedy design document, permit, order, consent decree, by statute or in other documents used in state response programs.

[53] Common Elements Guidance at pages 7-8

[54] Common Elements Guidance at page 8

[55] Id.

[56] Id. at page 10

[57] 42 U.S.C. §§ 9601(40)(D), 9607(q)(1)(A)(iii).

[58] 42 U.S.C. 9601(35)(B)(i)(II)

[59] Common Elements Guidance at page 10

[60] While a BFPP is immune from CERCLA liability, the 2002 CERCLA Amendments create a windfall lien in favor of EPA for property owned by a BFPP. 42 U.S.C. 9607(r). This lien is in addition to the non-priority lien provided in section 107(l) of CERCLA that EPA may impose on a property where it has performed response actions. 42 U.S.C. 9607(l). The lien becomes effective when EPA incurs response costs or notifies the owner of the property of its potential liability, whichever is later. Id. at 9607(2) (A)-(B). However, the lien is subject to the rights of holders of previously perfected security interests. Id. at 9607(l)(3). EPA is currently working on a windfall lien guidance document.

[61] Common Elements Guidance at page 11

[62] Common Elements Guidance at page 10

[63] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 4

[64] Common Elements Guidance at page 10

[65]Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 4

[66] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 5

[67] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 1

[68] Common Elements Guidance at page 10 n.10

[69] Id.

[70] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 2

[71] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 2

[72] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 3

[73] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 3

[74] Common Elements Guidance, Attachment B "Reasonable Steps Questions and Answers" at page 5

[75] 42 U.S.C. §§ 9601(40)(E), 9607(q)(1)(A)(iv), 9601(35)(A).

[76] Common Elements Guidance at page 12

[77] Id.

[78] Under the 1995 policy, the contiguous property owner would still have had to exercise due care and take precautions against the foreseeable acts or omissions of third parties to maintain its immunity.

[79] 42 U.S.C. §§ 9601(40)(G), 9607(q)(1)(A)(vi)

[80] Common Elements Guidance at page 13

[81] 42 U.S.C. §§ 9601(40)(C), 9607(q)(1)(A)(vii).

[82] Common Elements Guidance at page 13

[83] For example, the landowner may have to federal notices under 42 U.S.C. 9603 (CERCLA release reporting obligation); 42 U.S.C. 9654 (emergency notification); 42 U.S.C. 6991a (notification provisions for underground storage tanks); and 33 U.S.C. 1321 (oil or hazardous substances spills)

[84] Common Elements Guidance at page 13

[85] 42 U.S.C. 9607(q)(3)

[86] Common Elements Guidance at page 12

[87] 57 FR 18344 (April 29, 1992). The rule was subsequently vacated in *Kelley v. Environmental Protection Agency*, 15 F.3d 1100 (D.C. Cir. 1994). EPA then reissued its rule as a policy (60 FR 63517, December 11, 1995).

[88] 40 CFR Part 300
[89] In the lender liability rule, EPA took the position that as a substantive rule, the regulation would have the "force and effect" of law, and would be binding on private litigation. 57 FR at 18368.
[90] Of course, the landowners/tenants could still be liable under state law.
[91] MCL R 299.51001 et seq.
[92] Id. at 299.51007
[93] Id. at 299.51013
[94] Id. at 299.51009-51013
[95] Id. at 299.51003
[96] Id. at 299.51015-51019