Inside EPA - 06/07/2013

After Ruling, EPA Eyes Updating Guide On Brownfields Liability Defenses

Posted: June 5, 2013

EPA is weighing the need to update a 10-year-old interim guidance that compiles criteria landowners must meet to qualify for various defenses to Superfund liability at brownfields properties after a federal appellate court declined to grant the defenses for one prospective purchaser of contaminated property, causing uncertainty among developers.

EPA's Office of Site Remediation Enforcement (OSRE) "is assessing the need for and feasibility of" updating the 2003 "Common Elements" guidance, according to an EPA spokesman in a written response to questions.

In addition, the agency is "open to releasing new [brownfields] guidance if a strong need arises to address liability concerns," the spokesman says, echoing comments OSRE Deputy Division Director Helena Healy made at the Brownfields 2013 Conference in Atlanta May 16.

The appellate rulings are also prompting a national brownfields group to consider seeking legislative amendments to the 2002 brownfields law to further clarify liability relief for prospective purchasers and fix issues that EPA cannot address administratively, sources say.

EPA's existing 2003 guidance, known as 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*, lists several "common elements" of the 2002 Brownfields Amendments to Superfund law that new landowners, who are not responsible for contamination on a property, must meet in order to qualify for liability protections under the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA).

Under the 2002 law, Congress limited liability for brownfields prospective purchasers (BFPPs) of contaminated property to eliminate disincentives for developers to purchase and redevelop brownfields.
But according to Amy Edwards, a brownfields attorney at Holland & Knight, Congress provided "little clarification as to the precise nature and scope of these common elements, and each has thus been the subject of significant interpretation over the past decade."

Among other things, the Brownfields Amendments and guidance list several criteria that new owners of contaminated property must meet if they are to gain liability protection, one of which is that they exercise "appropriate care" regarding hazardous substances on the property by taking "reasonable steps" to prevent releases, stop any continuing releases, and prevent human or environmental exposures to any previously released hazardous substances. But many attorneys are concerned that the guidance as currently crafted does not provide adequate details on what steps developers must take to qualify as BFPPs especially in light of the recent appellate ruling as well as an earlier district court ruling.

In its April 4 ruling in *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*., the U.S. Court of Appeals for the 4th Circuit rejected arguments from developer Ashley that courts should apply a less stringent standard of "appropriate care" when determining BFPP status as compared to the traditional liability standard used for parties who are liable under CERCLA's section 107(a) liability scheme.

Instead, the court equated "appropriate care" to CERCLA's "due care" requirements, a standard required of innocent landowners who did not know of the presence of hazardous substances when acquiring a property.

As a result, the court found that Ashley had failed to meet the definition of a BFPP and was therefore ineligible to obtain liability protection against CERCLA claims because it had not taken the appropriate care required under the 2002 Brownfields Amendments (*Inside EPA*, April 12).

The 4th Circuit April 30 denied a request from PCS Nitrogen to rehear the case or rehear it *en banc*, though the company has not yet decided whether it will ask the Supreme Court to hear the case. The ruling, as well as a much different 2010 district court ruling in *3000 E. Imperial, LLC v. Robertshaw Controls Co., et al*., has created uncertainty over what steps or care developers must take to be considered BFPPs, the designation that allows them to qualify for liability protections.

For example, one brownfields attorney says there continues to be much concern among regulated parties and within the brownfields community about the self-executing nature of the BFPP provision, noting that the source of that uncertainty stems from the *Ashley II* and *3000 E. Imperial* cases.

Another source with a brownfields public/private sector group says that the recent court rulings have "chipped away at what we thought were good liability protections" in the 2002 Brownfields Amendments.
As a result of the concern, one attorney is calling for EPA to provide additional guidance on what steps developers must take to take the "appropriate care" needed to qualify as a BFPP. We "want EPA to put some flesh on the bones as to what is appropriate care so we don't have to rely on court rulings" to make that determination, the attorney says.

Lawrence Schnapf, an environmental brownfields attorney who spoke on the BFPP panel in Atlanta, told *Inside EPA* that at the conference he urged EPA to issue an updated version of its Common Elements guidance in order to provide further clarity following the court rulings. Prior to the conference, he said "it makes sense" to update the guidance to clarify to the public and EPA regional attorneys what constitutes "due care."

The current guidance simply states that due care case law should inform "appropriate care," he said in an email response to questions. "We now have a decade of experience and a number of cases that have addressed the scope of the appropriate care obligations," and the industry standard-setter ASTM has issued a continuing obligations guide, he said.

Brownfields attorneys also pressed EPA at the conference to increase its use of covenants not to sue and prospective purchaser agreements to parties not responsible for contamination, according to brownfields attorney Michael Goldstein, who also spoke at the forum and is heading up a committee under the National Brownfields Coalition, an alliance that represents a range of interests that favor brownfields cleanup and redevelopment, to advocate for further liability relief in legislation next year.

Goldstein says there is continuing "discomfort" with the underlying structure of the BFPP defense, citing the variability in court rulings.

While a coalition source declined to predict what the group's legislative proposals will be, Goldstein lays out two areas in need of amendments. The group plans to seek amendments to the BFPP defense to provide more certainty and clarity to developers and end users as to what they can do in the context of construction activities on brownfields, he says.

In particular, he says the group would like to see the definition of "disposal" amended under the BFPP provision. Under the brownfields law, a BFPP must show that all hazardous substance disposals occurred prior to acquisition.

He is calling for an amendment to "except out" the types of construction activities one would expect to occur on a brownfields site and construction that typically involves moving contaminated media from one location to another. Under current case law in some jurisdictions, moving contaminated media from one location to another within a brownfields site constitutes disposal and voids use of the BFPP defense, he says.

Goldstein also says there is a need for a statutory fix to address the affiliation issue that arose in *Ashley II*, noting there is a limit to what EPA can do on this administratively. One requirement needed to satisfy the BFPP criteria under the Brownfields Amendments is that the purchaser have "no affiliation" with potentially responsible parties. The appellate court in the case did not address the "no affiliation" requirement when it affirmed the lower court decision, but the lower court's finding on the matter has prompted worry among brownfields developers. The lower court found that Ashley, which indemnified previous site owners from liability and tried to persuade EPA not to take enforcement action for harm caused by these previous owners, had an "improper affiliation" with a liable party. -- *Suzanne Yohannan*

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Inside EPA - 06/07/2013, Vol. 34, No. 23