

Ashley II Case Highlights Importance of Due Diligence, Management Practices

Parties involved in the purchase and redevelopment of contaminated sites must consider carefully what steps should be taken to ensure they maintain landowner liability protections under the superfund law, according to a Miami attorney who helps coordinate regulatory approval for commercial reuse of the sites.

As demonstrated by the outcome of the *Ashley II* decision by a federal court in South Carolina in 2010, it is critical for parties involved in the cleanup and redevelopment of such sites to understand that due diligence requires both technical and legal expertise, Michael Goldstein, a partner with Akerman Senterfitt, told a webinar sponsored by BNA.

"Don't scrimp on environmental lawyers," he said. "Due diligence is a function of both technical and legal issues."

The July 20 webinar examined the "bona fide prospective purchaser" (BFPP) defense under the Comprehensive Environmental Response, Compensation, and Liability Act, and the viability of the liability protection in light of the court decision in *Ashley II of Charleston LLC v. PCS Nitrogen Inc.*, 746 F. Supp. 2d 692 (D.S.C. 2010). Catching many parties off guard, the U.S. District Court for the District of South Carolina ruled in September 2010 that Ashley did not meet several requirements necessary for its defense (19 EDDG 91, 12/16/10).

Shockwaves for Developers

"It's rare that a decision from a relatively small state has such implications in the regulated community," Larry Schnapf of Schnapf LLC said during the webinar. "It's probably sent shockwaves through the development community like the *Fleet Factors* case did with the lending community back in 1990."

The court held that Ashley failed to satisfy three elements of the BFPP. In particular, the court said Ashley did not prove that no disposals occurred on the site after Ashley acquired it. The court also held that Ashley did not exercise appropriate care because it did not carry out remedial actions recommended in the Phase I report. In addition, when Ashley demolished the aboveground structures on one of the parcels, but failed to clean them out and fill in the sumps, it may have exacerbated conditions, leading to possible releases.

As such, Schnapf recommended that a Phase I document not include recommendations—which are not required under law—because a court could be influenced if not all of them are followed. However, if Phase I does include recommendations, "implement them," he said. An alternative would be to set recommendations forth in a side letter to a lawyer, he said.

The court also ruled Ashley did not meet the "no affiliation" element of the BFPP. Ashley earlier had released and indemnified former owner Holcombe and Fair (H&F) from environmental liability. Because of the indemnification, Ashley attempted to persuade the Environmental Protection Agency not to take enforcement action to recover for any harm at the site caused by H&F. Ashley's request to EPA was on Cherokee's letterhead, a joint venture partner.

"The court did not say if it was a combination of both indemnification and Ashley's attempts to persuade EPA" that was causing it to deny the defense, Schnapf said. "I hope it was a combination of both of those items because certainly if merely indemnifying a seller of contaminated property is enough to make you have an improper affiliation, that effectively eviscerates the defense because many sellers are going to want to be indemnified by a purchaser."

Best Management Practices

In addition to hiring a lawyer to help develop a strong BFPP defense, the buyer should convene a preclosing construction planning meeting with all those participating in the project, Goldstein said. These could include the architect, planner, civil engineer, environmental consultant, environmental lawyer, general contractor, and landscape architect, he said.

The prospective buyer also should include and faithfully implement a "continuing obligations" roadmap that provides plans for termination, soil management, construction dewatering, stormwater system construction and management, long-term stewardship, environmental construction specifications for the general contractor, and a continuing obligations checklist, Goldstein said. He noted that a new ASTM International standard (E2790-11) provides a good verifications checklist for continuing obligations (20 EDDG 51, 7/21/11).

EPA Involvement Recommended

In light of the uncertainty about the self-implementing nature of the BFPP after *Ashley II*, Schnapf urged EPA to reconsider its position on PPAs, especially for bigger sites that have potentially a lot more contamination.

After the brownfields amendments of 2002 were passed, "EPA announced it was getting out of the [PPA] business," he said. At the very least, EPA should revise its 2003 *Common Elements Guidance* (12 EDDG 29, 4/17/03) to specify what due care and appropriate care are and define what "no affiliation means," Schnapf said. Parties believe they have complied with defense requirements "but find out later they didn't do something," he said.

So instead of allowing Ashley to recover the \$200,000 for which it went to court, the court found Ashley liable for 5 percent of the total cleanup costs, Schnapf said. Ashley also is responsible for the 16 percent share allocated to former owner H&F because of the indemnification. Ashley's total cleanup costs estimate is about \$8 million.

Recordings of the July 20 webinar are available for purchase by calling BNA Customer Relations at 800-372-1033 menu option 6.

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