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Brownfields

Careful Removal of Polluted Soil Advisable In Purchaser Liability Defense, Lawyer Says

Developers should exercise ''real care'' in handling contaminated soil during brownfield cleanups to ensure a successful liability defense under the superfund law, an environmental attorney told a webinar sponsored by Bloomberg BNA.

''It's not only site cleanup, but what you do with the soil'' that's important, said Lawrence P. Schnapf, principal of Schnapf LLC.

Schnapf made his comments during a webinar to discuss how to make the bona fide prospective purchaser (BFPP) defense to liability under the Comprehensive Environmental Response, Compensation, and Liability Act more effective.

So far, the BFPP defense hasn't held up in appropriate case law, frustrating many parties who say Congress's intent in providing generous liability protection for brownfields protection hasn't been reflected.

To strengthen the BFPP defense, Schnapf advised developers to look at a potential site and ''make sure it is fully investigated, anticipate vandalism and other issues that might go wrong and secure [the] site so that you don't have any ongoing releases for asserting your defense.''

During the Feb. 11 webinar, Alexander G. Shissias, principal of the Shissias Law Firm LLC, said his key ''takeaway'' in establishing a successful liability defense is to ''exercise extraordinary care in your choice of consultant,'' as well as local environmental counsel.

Shissias, who said he had a ''small part'' in the *Ashley* case, also said he had a ''fairly short list of people who I'd recommend.''

Congressional Intent Stymied

When CERCLA was amended by the Brownfields Act of 2002 (Pub. L. No. 107-118), Congress intended to provide generous liability protections to encourage brownfields redevelopment.

The BFPP defense enacted by the Brownfields Act allows a prospective buyer to purchase property without knowledge of contamination and without incurring liability, providing the buyer shows no disposal occurred after acquisition of the property and meets a number of other requirements (20 EDDG 59, 8/18/11).

However, the legislation didn't appear to reflect Congress's intent, parties have said. When it was enacted, there was great disappointment because the BFPP protections appeared to be difficult to secure and maintain, with no way to ensure compliance with a litany of requirements.

Moreover, since the defense was created in 2002, courts have ruled that parties trying to invoke the defense didn't met the requirements, despite the considerable efforts the plaintiffs took to defend themselves.

Post-Acquisition Obligations

Schnapf said the post-acquistion continuing obligation requirements of the BFPP defense are the reason developers or property owners lose their protection, ''not so much the up-front all appropriate inquiry and no prior disposals.''

For example, in a South Carolina case known as *Ashley II*, a federal district court found in 2010, and an appeals court confirmed in 2013, that the property owner didn't meet the BFPP defense because of inadequate care after the site was bought.

The owner, developer Ashley II of Charleston LLC, purchased most of a superfund site that formerly was fertilizer manufacturing plant for redevelopment. Ashley sought to recover about $200,000 it had spent on remediating the property, which was contaminated with arsenic, lead and polyaromatic hydrocarbons.

In its lawsuit, Ashley argued it wasn't liable for the $200,000 it spent because it was protected by the BFPP defense. The U.S. District Court for the District of South Carolina, however, said the developer didn't meet several elements of the BFPP defense, including failure to prove no disposals occurred on the site after it was purchased (*Ashley II of Charleston LLC v. PCS Nitrogen Inc.*, 746 F.Supp. 2d 692, 72 ERC 2227 (D.S.C. 2010)).

Sump Remediation

Although Ashley hadn't disposed of any substances on the site, it didn't remediate and fill in several cracked sumps containing contaminated water for two years. The court said the sumps potentially could leak hazardous waste.

The U.S. Court of Appeals for the Fourth Circuit upheld the findings of the lower court in April, saying that while Ashley could recover response costs from other potentially responsible parties, the developer itself was partially responsible for contamination of the site (*PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 76 ERC 1683 (4th Cir. 2013)) (22 EDDG 25, 4/18/13).

Expedited Cleanup

Schnapf said a common theme running through *Ashley* and other case law where the BFPP defense failed is ''essentially delayed cleanup, sometimes with delayed reporting or delayed discovery.''

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''Delayed discovery is usually because of inadequate due diligence, while delayed cleanup can be for a variety of reasons,'' he said.

Usually the property owner is unaware of the extent of the contamination, isn't taking the contamination seriously, or may be assembling properties and waiting to start work, Schnapf said. During that time, the contamination either gets worse or people potentially could be exposed, he said.

Shissias agreed, saying, ''It seems to me that if you're going to buy a site and rely on BFPP, then you had better attend to cleanup in very short order.''

The *Ashley* decisions found that the developer failed to prove no disposal, including passive migration, occurred after buying the site, he said.

Common Elements

In a related area, Schnapf said the Environmental Protection Agency should update its Common Elements Guidance to make the BFPP defense more attainable.

''We're kind of flying blind right now . . . with 20/20 hindsight,'' he said.

The Common Elements Guidance was released in 2003 to provide EPA personnel with general guidance on the ''common elements'' of CERCLA liability protection.

Parties have told Bloomberg BNA, however, it does little to clarify the BFPP defense (22 EDDG 75, 10/17/13).

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