

# EPA Declines To Clarify District Court Ruling On Brownfields Liability

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EPA says it has no plans to further clarify how purchasers of contaminated land can maintain their bona fide prospective purchaser (BFPP) liability protections in light of a controversial district court ruling that calls into question a common practice of indemnifying sellers in a brownfields transaction.

While a 2010 ruling from the U.S. District Court for the District of South Carolina in the case *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, which denied a brownfields developer's BFPP status, "does not necessarily comport with the existing Agency 'Common Elements' guidance," according to EPA, the agency "at this time" has no plans to address any discrepancy.

But environmental attorneys argue EPA clarification is necessary, with one source saying the ruling could have a "chilling effect" on brownfields redevelopment because of the court's finding that Ashley failed to meet the no affiliations requirement of the BFPP defense because it had indemnified the sellers of the contaminated property and then tried to discourage EPA from pursuing a claim against two of the parties.

"Ashley's efforts to discourage EPA from recovering response costs covered by the indemnification reveals just the sort of affiliation Congress intended to discourage," the court ruled last year. And the court in May clarified that the "reason that Ashley did not meet the no affiliation requirement of BFPP status is that Ashley is potentially liable for response costs due to a contractual relationship with the Holcombe and Fair Parties." In the amended order, the court also agreed to use the word "release" instead of "indemnity" to describe Ashley's agreements with the Holcombe and Fair Parties. *Relevant documents are available on InsideEPA.com. (Doc ID: [2370866](#))*

PCS Nitrogen and other third-party defendant, Ross Development Corp., have appealed the case to the U.S. Court of Appeals for the 4th Circuit.

Providing indemnity to the seller, however, is a common practice in brownfields transactions, and attorney Larry Schnapf said July 20 during a Bureau of National Affairs webinar that he hopes the judge didn't deny Ashley BFPP status simply for providing indemnity to the seller because that "eviscerates" the BFPP defense.

"I think it is imperative that EPA provide some general guidance if it wants to help stimulate brownfield development," the first source says.

EPA in a statement to *Inside EPA* says that "the limited facts and minimal discussion of the relationship between the parties in the decision" make it difficult to assess the amount of separation between the agency's 2003 "Common Elements" guidance and the court ruling.

"The court's analysis does not necessarily comport with the existing Agency 'Common Elements' guidance, but it is difficult to assess based on the limited facts and minimal discussion of the relationship between the parties in the decision. In analyzing the 'no affiliation' requirement, EPA would rely on its existing guidance interpreting the statutory definition of 'affiliation,'" the agency says.

A source with the National Brownfields Coalition says the ruling has not changed the group's agenda, but there could be more discussion about the ruling's implications once the economy improves.

"I'm not sure that the industry has focused on this yet because of the overwhelming problem of financing and demand conditions, and when they do start focusing on it -- assuming that those fundamental problems start sorting themselves out -- then I think we may hear more about the *Ashley* case and its ramifications," the source says.

**Ashley initially brought the case against PCS Nitrogen seeking a declaratory judgment** that PCS is jointly and severally liable for the cost of remediating the 43-acre site in Charleston, SC, and seeking a money judgment of more than \$194,000 to reimburse Ashley for costs of remediation that it had already incurred. PCS filed contribution claims against Ashley and several other parties, including the city of Charleston.

Past owners of the property operated various industrial facilities, most notably a fertilizer plant which caused much of the pollution. The contamination at the site was well documented before Ashley purchased it in two phases in 2003 and 2008, in both cases indemnifying the sellers against future environmental liability.

At issue in the case was the extent to which Ashley met the eight criteria required to use the BFPP defense. The criteria are that all disposal of hazardous substances at the facility occurred before the purchaser acquired the facility; that the purchaser made all appropriate inquiries (AAI) into the previous ownership and uses of the facility; that the purchaser provides all legally required notices with respect to the discovery or release of any hazardous substance at the facility; that the purchaser exercises "appropriate care" with hazardous substances found at the facility; that the purchaser provides full cooperation to persons authorized to conduct response actions; that the purchaser is in compliance with and does not impeded the effectiveness of any land use restrictions; that the purchaser complies with any request for information or administrative subpoena; and that the purchaser is not potentially liable, or affiliated with any person that is potentially liable, for response costs at the facility.

The court found that Ashley had met most of the criteria -- including the AAI test even though there were inconsistencies between Ashley's site assessments and the relevant ASTM standards. But the court found the company failed to meet three of the criteria, and therefore was ineligible for the BFPP defense.

Specifically, the court concluded that Ashley failed to prove that no disposals occurred on the site after its acquisition of the site, that Ashley failed to prove it had exercised appropriate care

with respect to hazardous substances found at the facility, and that Ashley failed to prove it has no affiliation with liable parties.

On the releases issue, the district court, citing 4th Circuit precedent, found that after Ashley tore down a structures on the site, it allowed rainwater to fill sumps and other structures, likely leading to disposals.

The court also ruled that Ashley had not exercised appropriate care at the site. Ashley's environmental consultant noted sumps and concrete pads on one parcel as so-called recognized environmental conditions, but Ashley didn't clean and fill the sumps, for instance, when it tore down structures.

On the affiliation issue, the court noted that this element of the BFPP defense required Ashley to prove that it is 1) not a potentially responsible party, 2) affiliated with persons that are potentially liable for response costs, including through contractual relationships, or 3) the result of a reorganization of a business entity that was potentially liable.

While there is no allegation that Ashley is the result of a reorganization of previous site owners, as the current owner of a site where hazardous materials are still leaching through the soil, Ashley can be held liable for response costs, the court found. And Ashley's indemnification of the Holcombe and Fair Parties and Allwaste from environmental liability at the site violates the affiliation portion of the defense, the court said.

"Because of its indemnification and release of the Holcombe and Fair Parties, Ashley attempted to persuade EPA not to take enforcement action to recover for any harm at the Site caused by the Holcombe and Fair Parties," the district court ruled. "In indemnifying the Holcombe and Fair Parties, Ashley took the risk that the Holcombe and Fair Parties might be liable for response costs. Ashley's efforts to discourage EPA from recovering response costs covered by the indemnification reveals just the sort of affiliation Congress intended to discourage. The court finds that Ashley's affiliation with the Holcombe and Fair Parties precludes the application of the BFPP defense."