

## *On the Cutting Edge: An Insider's Perspective*

### **EPA's Guidance on Liability Defenses Not Working as Intended, Parties Say**



#### **BNA Snapshot**

##### **Brownfield Liability Defenses**

**Key Development:** EPA guidance issued in 2003 on landowner liability protections in brownfields redevelopment is not working as intended, but affected parties disagree on whether the guidance should be revised.

**What's Next:** EPA says the guidance may be revised as the agency gains more experience in implementing the 2002 Brownfields Law.

Guidance issued by the Environmental Protection Agency in 2003 on landowner liability protections following passage of a new brownfields law is not working as intended, but affected parties disagree on whether the guidance should be revised.

The **Common Elements Guidance** does little to clarify liability defenses for brownfields property owners and developers, and it is not helpful for brownfields development, according to parties interviewed by Bloomberg BNA.

"It is definitely time for EPA to revisit some of the statements in its 2003 Common Elements guide," Amy Edwards, a partner with the law firm Holland & Knight, told Bloomberg BNA in an e-mail.

Edwards also said the guidance, which was issued under the Comprehensive Environmental Response, Compensation, and Liability Act, was never subject to public notice and comment. Bill Weissman, a former partner with Venable LLP, agreed that unless the public, and especially developers, are invited to provide input, little would be accomplished by revising the guidance.

Even with public input, Weissman was skeptical that any EPA revisions would be better than the existing guidance and in fact could make the situation worse.

If superfund enforcers take the lead in drafting revisions, "there is very little chance that a document that generously promotes the brownfields development incentives that the CERCLA defenses were intended to achieve will emerge," he said.

#### **Brownfields Amendments in 2002**

In 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act (Pub. L. No. 107-118). The law amended CERCLA by providing funds to assess and clean up brownfields, as well as funds to enhance state and tribal response programs. The law also clarified CERCLA liability protections. The amendments were intended to encourage cleanup and redevelopment of brownfield sites by offering those incentives.

In March 2003, the EPA Office of Site Remediation Enforcement issued the document titled, "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" ((12 EDDG 29, 4/17/03) to provide agency personnel with general guidance on the "common elements" of CERCLA landowner liability protections.

The “common elements” are the statutory threshold criteria and ongoing obligations a landowner must meet to qualify as (1) a bona fide prospective purchaser (BFPP), (2) a contiguous property owner or (3) an innocent landowner, according to the EPA. Parties who qualify for one of these three defenses have conditional CERCLA liability protection.

“Many of the statements in the 2003 guide regarding what is needed to qualify for the Landowner Liability Protections (LLPs) are not practical in the real world, essentially making it impossible for many brownfields redevelopers to successfully defend their status as a BFPP if challenged in court,” Edwards said.

“This was certainly not Congress’s intent,” she said.

Weissman said the legislative history of the brownfields amendments “clearly” shows the intent to provide generous liability protections to create incentives for developing abandoned properties.

However, “to be sure, the problem begins with Congress,” he said. Although it prescribed a set of eligibility conditions by which developers could qualify for CERCLA liability protection, it sometimes used terms without defining them, Weissman said.

The Common Elements Guidance gave those terms “their narrowest possible construction,” he said.

Despite the criticism of the document, the EPA has not given any indication that it intends to revise the guidance. It may look at the need for new or updated policy as appropriate or necessary, the agency told Bloomberg BNA in an e-mail.

### **EPA Gave Unrealistic Examples**

Edwards said that, given the limited case law since passage of the brownfields amendments of 2002, it would be helpful if the EPA clarified some of the “murkier” elements of the defenses by providing better examples of “reasonable steps,” compliance with land use restrictions and “not impeding the effectiveness or integrity of institutional controls.”

“Many of the examples given in the 2003 guide were unrealistic, at best,” she said.

For example, the EPA stated that an example of “impeding the effectiveness of an institutional control would be if the landowner applies for a zoning change or variance when the current designated use of the property was intended to act as an institutional control,” Edwards said.

The EPA’s example fails to take into consideration that the zoning change may have been requested for completely legitimate reasons and that the landowner may not have known, or had any reason to know, that zoning was being used as an institutional control (IC), she said.

### **Compliance With Institutional Controls**

Complying with and not impeding an institutional control is one of eight elements of a successful bona fide prospective purchaser defense.

Given the better and more durable institutional control tools that are available today, a landowner should never need to “guess” whether zoning is being used as an institutional control or risk losing its defense, Edwards said.

Regulated parties have attempted to provide clearer guidance on these issues through ASTM standards E2091 and E2790, Edwards said. In addition, the National Conference of Commissioners on Uniform State Laws has provided a better institutional control “tool”—the environmental covenant—for implementing ICs controls in the first place, she said.

"EPA needs to update its guidance in light of the improvements that have been made in the basic institutional control 'tools,' IC tracking systems, and the like over the past decade," she said.

"The main problem with the Common Elements Guidance is that it fails to provide a clear pathway for persons seeking to purchase a commercial property to qualify for the CERCLA liability protections that Congress enacted in 2002," Weissman said.

The guidance reads as though it was written primarily by EPA's superfund enforcers whose mission was to limit the scope of the CERCLA defenses "to the maximum degree possible rather than by the advocates of brownfields development whose mission would be to give the redevelopment incentives that Congress enacted a general construction," he said.

Larry Schnapf, of Schnapf LLC, told Bloomberg BNA in an e-mail, "The problem with the BFPP liability protection is that it is largely self-implementing. The current Common Elements guidance provides property owners with very little insight on how to enhance the possibility that they have qualified for the BFPP," he said.

"Thus, property owners are never sure that they have successfully qualified for this LLP until they have been sued and expended funds successfully defending those lawsuits," he said. Showing that a party exercised appropriate care is another element of a successful BFPP defense.

"We've now had a decade of experience with the BFPP and a line of cases interpreting what constitutes 'appropriate care.' The case law has highlighted a number of common issues or themes that have caused property owners to either lose or jeopardize their BFPP status," Schnapf said. "It would be helpful if EPA could revise its guidance to discuss those common issues that have come into focus."

"Perhaps the most important issue EPA should consider is management of on-site soils, such as moving contaminated dirt or exposing contaminated soil," Schnapf said.

Other issues the agency might want to cover might include demolishing buildings, assembling vacant properties while waiting for financing, phasing in development, and closing tanks," he said.

### **After-the-Fact Determinations**

Christopher Roe, an attorney with Fox Rothschild LLP, told Bloomberg BNA, "A fundamental problem with the landowner liability protections is that there will be an after-the-fact determination of whether someone met the general criteria set out by the EPA and the superfund law."

In the past, the EPA and prospective purchasers may have entered into an agreement where the agency laid out very clearly what a party must do to meet liability criteria for a given site, he said.

The EPA, however, has moved away from such agreements, taking the position they are unnecessary because of the landowner liability protections, Roe said.

"But the problem with that, as is clear in the recent case law, is that the criteria are general and subject to differing interpretations when they get applied after the fact to specific actions a landowner takes or fails to take at a particular property," he said.

### **Disappointment With 'Ashley' Decision**

Some lawyers expressed disappointment that the bona fide prospective purchaser defense was not addressed by a federal appeals court in a major ruling in a South Carolina case in April.

Many were hoping the decision by the U.S. Court of Appeals for the Fourth Circuit in *Ashley II* would help clarify the BFPP defense, but lawyers said the decision shed no light on it (*PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 76 ERC 1683, 2013 BL 90779 (4th Cir. 2013); (22 EDDG 25, 4/18/13)).

In 2010, the U.S. District Court for the District of South Carolina held that *Ashley II*, the owner of a former fertilizer site, could not claim the BFPP defense because it did not exercise appropriate care at the site and had engaged in prohibited affiliation with prior liable owners through indemnification agreements (*Ashley II of Charleston LLC v. PCS Nitrogen Inc.*, 746 F. Supp. 2d 692, 72 ERC 2227, 2010 BL 242893 (D.S.C. 2010)).

In July, the former owner of the site, PCS Nitrogen Inc., petitioned the U.S. Supreme Court to review the appeals court decision on a separate liability issue of divisibility of harm under CERCLA (*PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, U.S., No. 13-139, 7/29/13; (22 EDDG 72, 9/19/13)).

The failure of the appeals court to clarify the BFPP issue in the *Ashley II* decision again raised the question of whether the Common Elements Guidance should be revised.

David Freeman, an attorney at Gibbons P.C., told Bloomberg BNA in an e-mail that the appeals court upheld the district court on its finding that *Ashley II* did not exercise appropriate care, but did not mention the prohibited affiliation alternative basis of the district court's ruling.

"It was that part of the district court decision that caused widespread consternation among the regulated community," he said.

"While one generally can't read too much into a court's silence on a particular issue, the fact that the district court's controversial rationale failed to find support at the circuit court level is clearly a matter of some significance," he said.

In addition, Freeman said "EPA has already spoken on the issue" in its September 2011 document, "Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections."

"In that document, EPA pointedly noted that it 'generally does not intend to treat certain contractual or financial relationships (e.g., certain types of indemnification or insurance agreements) that are typically created as part of the transfer of title ... as disqualifying affiliations,'" Freeman said.

Since both the March 2003 and the September 2011 documents have equal status in that they are nonbinding guidance documents, there is no particular need to amend the earlier document to incorporate the EPA's current—and in his view correct—thinking on this issue, Freeman said.

### **Discussion of Affiliation**

One element of a successful BFPP defense is for a party to show it was not a potentially responsible party and had no affiliation with parties potentially liable for costs.

Roe said that in the wake of *Ashley II*, a discussion of "affiliation" in the Common Elements Guidance might be helpful because the district court determined that an indemnity agreement created an affiliation that disqualified the party from the BFPP protection.

The Fourth Circuit's decision in *Ashley II* does not discuss the affiliation issue, Roe said. "My understanding is that the reason it didn't get to the affiliation question was because it determined that *Ashley II* had not met the appropriate care standard and therefore the affiliation analysis was unnecessary," he said.

### **'Insight Into EPA's Thinking'**

Schnapf said the 2011 guidance provided some helpful direction "on what kinds of relationships would not be considered improper affiliations that could cause a purchaser to lose its BFPP status."

"While [EPA's] guidance did not and could not cover every conceivable possible relationship, it did provide insight into EPA's thinking on the contours of appropriate BFPP relationships," Schnapf said. "EPA should provide the same kind of guidance on what it believes constitutes 'appropriate care.' "

If the EPA does revise the 2003 guidance, *Ashley II* would likely be addressed because it's the first appellate decision on the BFPP defense, the agency told Bloomberg BNA in an e-mail.

The guidance itself notes that it may be revised as the EPA gains more experience in implementing the 2002 Brownfields Law.

However, the EPA has not taken any action yet to revise the guidance, nor has it announced any plans for new policy in the area covered by the guidance. It may look at the need for new or updated policy as appropriate or necessary, the agency said.