By Jessica Coomes

The proposed rule revising air pollution limits for the oil and natural gas industry is available at http://epa.gov/airquality/oilandgas/pdfs/20110728proposal.pdf.

Brownfields

Recent Case Underscores Uncertainty About Liability Protection, Lawyers Say

Parties involved in the purchase and redevelopment of contaminated sites must carefully consider 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 recent court decision in *Ashley II (Ashley II of Charleston LLC v. PCS Nitrogen Inc.*, 746 F. Supp. 2d 692 (D.S.C. 2010)).

At issue is a lawsuit involving a cost-recovery action under CERCLA. Ashley II Charleston LLC bought most of a superfund site in Charleston, S.C., to redevelop, and sought to recover about $200,000 it had spent on remediating approximately 34 acres of land.

Ashley was a joint venture with several real estate developers and Cherokee Investment Partners.

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.

The ruling has widespread implications because it represents the first time a federal district court has interpreted the requirements for the bona fide prospective purchaser defense under superfund law and the first time a court has decided the level of appropriate care under the law, Larry Schnapf of Schnapf LLC said during the webinar.

"It's rare that a decision from a relatively small state has such implications in the regulated community," Schnapf said. "It's probably sent shivers through the development community."

Ashley Claims Prospective Purchaser Defense. Ashley had argued it was not liable for the cleanup costs at the site, which was contaminated with arsenic, lead, and polyaromatic hydrocarbons, because it was protected by CERCLA's bona fide prospective purchaser defense.

The defense, enacted by Congress under the CERCLA Brownfields Amendments of 2002, allows a prospective buyer to purchase property without knowledge of contamination and without incurring liability, providing the buyer proves eight elements listed under the law.

To assert the defense successfully, a party must show by a preponderance of the evidence that no disposal occurred after acquisition of the property and that the party:

- conducted all appropriate inquiries;
- filed all legally required notices;
- exercised appropriate care;
- provided full cooperation and assistance in accessing the site;
- complied with and did not impede the implementation of institutional controls;
- complied with any request for information or administrative subpoena; and
- was not a potentially responsible party and had no affiliation with parties potentially liable for response costs.

The court held that Ashley did not prove three of the eight elements: It failed to prove that no disposals occurred on the site after Ashley acquired it; it did not exercise appropriate care with regard to hazardous substances; and it did not prove that it was not a potentially responsible party and had no affiliation with other potentially responsible parties in the case.

In the first element, Ashley failed to prove no disposals occurred because it is likely there were disposals on the portion of the superfund site owned by Allwaste Tank Cleaning property after Ashley tore down the structures in 2008 because the sumps contained hazardous substances, were cracked, and were allowed to fill with rainwater, the court said.

Ashley did not test under the concrete pads, sumps, or trench to see if the soil under the structures was contaminated. Ashley attempted to introduce evidence that no disposals occurred after its acquisition of the property, but this was struck at trial because it was not disclosed before trial.

Court Denied 'Appropriate Care' Claim. In the second element, the court concluded that Ashley did not exercise appropriate care with regard to hazardous substances because it did not carry out remedial actions recommended in the Phase I remedial investigation.

When Ashley demolished all the above-ground structures on the Allwaste parcel, but failed to clean them out and fill in the sumps, it may have exacerbated conditions, leading to possible releases, the court said. At trial, an expert testified Ashley should have capped, filled, or removed the sumps when it demolished the structures.

In addition, Ashley's failure to prevent such a debris pile from accumulating on the site, failure to investigate it, and failure to remove it for over a year indicates a lack of appropriate care, the court said.

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

Moreover, Ashley did not enter into a voluntary brownfields cleanup agreement with the state, where the requirements for remediation would have been clearly laid out, Schnapf told BNA after the webinar. He strongly recommended that parties enter into such an agreement.

Court Denied 'No Affiliation' Claim. In a third finding, the court ruled Ashley did not meet the "no affiliation" element of the purchaser's defense.

As the current majority owner of the site on which hazardous materials are still leaking through the soil, Ashley can be held liable for response costs and therefore cannot prove it is not a potentially responsible party, which is one element of the defense, the court held.

Second, Ashley had earlier released and indemnified former owner Holcombe and Fair 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 Holcombe and Fair, the

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court said. Ashley's request to EPA was on Cherokee's letterhead, a joint venture partner.

"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 said.

The court said Ashley's affiliation with the Holcombe and Fair parties precluded the application of the bona fide prospective purchaser defense.

"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 during the webinar. "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."

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. In addition, Ashley is responsible for the 16 percent share allocated to former owner Holcombe and Fair, since Ashley had indemnified the party, Schnapf said. The 2009 estimate for Ashley's total cleanup costs is about $8 million, he said.

Best Management Practices. In addition to hiring a lawyer to help develop a strong bona fide prospective purchaser 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.

In another recommendation, the prospective buyer should include a "continuing obligations" roadmap that provides plans for termination, soil management, construction dewatering, storm water system construction and management, long-term stewardship, environmental construction specifications for the general contractor, and a continuing obligations checklist, Goldstein said.

A recently published ASTM International Standard (E2790-11) provides a good verifications checklist for continuing obligations, he said.

The standard provides detailed guidance for owners of properties affected by contamination and sets forth basic steps addressing continuing obligations that should be followed to maintain superfund landowner liability provisions.

In a final best management practice, the buyer should "faithfully implement the continuing obligations roadmap," Goldstein said.

EPA Involvement Recommended. In light of the increased uncertainty surrounding the self-implementing nature of the BFPP resulting from the holdings in *Ashley II*, Schnapf urged EPA to reconsider its position on prospective purchaser agreements, especially for bigger cases.

After the brownfields amendments of 2002 were passed, "EPA announced it was getting out of the [prospective purchaser agreement] business," he said.

At the very least, EPA should revise its *Common Elements Guidance*, to specify what due care and appropriate care are, and to 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.

Issued in March 2003, the *Common Elements Guidance* addresses five of the criteria that a landowner must meet to qualify for certain defenses under CERCLA.

Notable Findings of Law. In one notable finding of law, the court rejected the divisibility argument, Schnapf said. The court basically felt that because of the surface runoff and the widespread contamination it really was too difficult to figure out whose contamination caused what, he said.

In addition, Ashley's response actions were found consistent with the National Oil and Hazardous Substances Pollution Contingency Plan, despite the absence of a formal agreement with the state, he said.

In other findings, current operators do not need to direct operations related to pollution to be liable for response costs and exercise of due care includes informing authorities of the discovery of contamination, Schnapf said.

BY PAT WARE

The opinion by the U.S. District Court for the District of South Carolina in Ashley II of Charleston LLC v. PCS Nitrogen Inc. *is available at http://op.bna.com/env.nsf/r?Open=jsml-8jypk8 and http://op.bna.com/env.nsf/r?Open=jsml-8jypfl.*

Legislative Action

Senate Bill Reallocating Deepwater Fines Will Be Marked Up After Recess, Boxer Says

Legislation to require that 80 percent of Clean Water Act penalties incurred in relation to the 2010 Deepwater Horizon oil spill be used for the restoration of the Gulf Coast will be among the Senate Environment and Public Works Committee's first agenda items after the August recess.

"We'll be bringing it back the first week or the second week when we get back," Sen. Barbara Boxer (D-Calif.), who chairs the committee, told reporters Aug. 2.

The legislation (S. 861) would establish a Gulf Coast Restoration Trust Fund, which would receive at least 80 percent of all administrative and civil penalties to be paid by BP or other responsible parties in connection with the spill.

The Resources and Ecosystem Sustainability, Tourism Opportunities, and Revived Economy of the Gulf Coast Act of 2011 (RESTORE) was introduced by Sens. Mary Landrieu (D-La.) and Richard Shelby (R-Ala.) July 21.

Boxer had intended to move the legislation through the committee prior to the August recess, but said action was postponed because of work on the legislation related to increasing the debt ceiling.

The RESTORE legislation also would establish a Gulf Coast Ecosystem Restoration Council that would develop and fund a comprehensive plan for the Gulf Coast's ecological recovery and resiliency. The council would give priority to large-scale projects that contribute the most to the overall Gulf Coast restoration, and to projects in established state restoration plans.

BY ARI NATTER