Counseling The Client On The CERCLA Windfall Lien

Larry Schnapf

The bona fide purchaser provision may lure unwary purchasers to a brownfield, only to fall into the pitfall of the windfall lien.

FOR PURCHASERS, ALLURING BROWNFIELDS development incentives sometimes come with an unforeseen cost. The Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (January 11, 2002) ("2002 Brownfield Amendments"), added a bona fide prospective purchaser ("BFPP") defense, 42 U.S.C. §9601(40), to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9601 *et seq.* The BFPP defense allows a purchaser knowingly to take title to contaminated property if the purchaser satisfies certain criteria. The defense comes with an important hitch. In certain circumstances, the Environmental Protection Agency Guidance ("EPA")

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may perfect a "windfall lien" on property owned by a BFPP to recover cleanup costs. 42 U.S.C. §9607(r). The EPA has issued guidance on the lien.

The author discuss the scope of the lien and the circumstances under which the EPA may assert it. He concludes by suggesting ways of resolving uncertainty about windfall liens.

THE CERCLA BFPP DEFENSE • Before the 2002 Brownfield Amendments, the principal defense to CERCLA liability that was available to purchasers or occupiers of contaminated property was the innocent purchaser defense. To invoke this defense successfully, the purchaser or occupier must establish that it had no reason to know that the property was contaminated. 42 U.S.C. §9601(35)(A)-(B). To establish that it had no reason to know of the contamination, a defendant has to demonstrate that it took "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." (After the 2002 Brownfield Amendments, "all appropriate inquiries...into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices." 42 U.S.C. §9601 (35)(B)(i).)

In determining whether the defendant has made an "appropriate inquiry," CERCLA requires that any specialized knowledge or experience of the innocent owner be taken into account as well as the relationship of the purchase price to the contaminated property and whether the presence of contamination was obvious or could be detected by an appropriate site inspection. Since the problem with brownfields is the existence or suspicion of contamination, the defense has been largely unavailable to prospective developers or tenants of brownfield sites.

The Bona Fide Prospective Purchaser Defense

To eliminate this obstacle to the redevelopment of brownfields, the Brownfield Amendments created the bona fide prospective purchaser defense ("BFPP"). The BFPP defense is available for landowners or tenants who knowingly acquire or lease contaminated property after January 11, 2002. The BFPP defense applies to property that qualifies as a "brownfield site." It also applies to sites on the National Priorities List ("NPL") which is commonly known as the federal Superfund List. Only those parties that qualify for the BFPP defense are potentially subject to the windfall lien.

To qualify for the BFPP, the owner or tenant must establish by a preponderance of the evidence that it has satisfied the following conditions set out in 42 U.S.C. §9601(40):

- The purchaser acquired the facility after all disposal of hazardous substances occurred—42 U.S.C. §9601(40)(A);
- The purchaser conducted an "appropriate inquiry"—42 U.S.C. 9601(40)(B);
- The purchaser complied with all release reporting requirements—42 U.S.C. 9601(40)(C);
- The purchaser took "appropriate care" by taking reasonable steps to stop any continuing release; prevented any threatened future release; and prevented or limited human, environmental, or natural resource exposure to any previously released hazardous substance—42 U.S.C. §9601(40)(D);
- The purchaser cooperated, assisted, and provided access to persons who were authorized to conduct response actions or natural resource restoration at the property—42 U.S.C. §9601-(40)(E);
- The purchaser complied with any land use restrictions established as part of response action and did not impede the effectiveness or integrity of any institutional control used at the site—42 U.S.C. §9601(40)(F);

- The purchaser provided access to persons authorized to conduct response actions to operate, maintain, or otherwise ensure the integrity of land use controls at the site—*Id.*;
- The purchaser complied with any the EPA request for information or administrative subpoena issued under CERCLA—42 U.S.C. §9601(40)(G); and
- The purchaser establishee that it was not a potentially responsible party ("PRP") or affiliated with any other PRP for the property through any direct or indirect familial relationship, any contractual or corporate relationship, or as a result of a reorganization of a business entity that was a PRP. 42 U.S.C. §9601(40)(H).

The EPA's 2002 Guidance Document

In a 2002 memorandum, the EPA said that the BFPP defense makes it unnecessary for private parties to obtain prospective purchaser agreements ("PPAs"). However, it also said that entering into a PPA or some other form of agreement would nonetheless serve the public interest in two instances:

- When a significant windfall lien is likely and the purchaser needs to resolve the lien before it secures financing; and
- When the project will provide substantial public benefits such as performance of a cleanup, reimbursement of the EPA response costs, creation of jobs, revitalization of long-blighted property, or promotion of environmental justice and it is therefore necessary to ensure that the parties complete the transaction.

"Bona Fide Prospective Purchasers and the New Amendments to CERCLA," Memorandum from Barry Breen, Director, Office of Site Remediation, EPA (May 31, 2002), www.vitanuova.com/bonafide.pdf.

The guidance provided some examples of when a PPA might be appropriate for this second instance:

- The facility has not been remediated, no viable PRP exists that can be required to timely conduct the cleanup, and no potential developer is willing to undertake the entire cleanup;
- A purchaser that has committed to perform a major cleanup as part of the redevelopment is concerned about its potential liability as an owner or operator of the facility;
- The EPA has commenced an enforcement action against the primary PRPs for the site and there is a very real possibility that the purchaser may become the subject of a contribution action.

The guidance indicated that, in these circumstances, the EPA could enter into a settlement with a purchaser after the purchaser acquires the property and otherwise qualifies as a BFP, even though the purchaser may be subject to a contribution action.

The EPA's 2003 Guidance Document

In 2003, the EPA issued its interim guidance interpreting the obligations that parties must satisfy to qualify for the CERCLA landowner defenses (*"Common Elements Guidance"*). "Interim Guidance Regarding Criteria Landowners Must Meet In Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner or Innocent Landowner Limitations on CERCLA Liability," Memorandum from Susan E. Bromm, Director of Site Remediation Enforcement, U.S. the EPA, March 6, 2003, www/epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf (*"Common Elements"*).

The guidance identifies two initial "threshold criteria" that a party must satisfy at the time it takes title or possession of the property.

First Criterion: Appropriate Inquiry

The first threshold criterion is that the landowner conducts "appropriate inquiry." The guidance also reaffirms that although a BFPP

may perfect a "windfall lien" on property owned by a BFPP to recover cleanup costs. 42 U.S.C. §9607(r). The EPA has issued guidance on the lien.

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First Criterion: Appropriate Inquiry

The first threshold criterion is that the landowner conducts "appropriate inquiry." The guidance also reaffirms that although a BFPP

may acquire contaminated property with knowledge of the contamination, it must still perform an appropriate inquiry. Of course, a party who knows or has reason to know of contamination will not be eligible for the contiguous property owner or innocent landowner liability protections.

Second Criterion:
No Liability For Response Costs

The second threshold criterion is that a party must not be potentially liable or affiliated with a potentially responsible party or any other party who is potentially liable for response costs. The guidance acknowledges that the 2002 Brownfield Amendments did not define the phrase "affiliated with." The guidance suggests that "affiliation" could be broadly interpreted but suggested that Congress intended to prevent a party from contracting away its CERCLA liability through a transaction with a family member or related corporate entity. However, a high-ranking EPA official who was involved in the drafting of the document indicated at a conference that a post-enactment tenant would not be able to avail itself of the BFPP defense if it was leasing the property from a pre-enactment owner who was a PRP.

Satisfying The Continuing Obligations

The guidance then discusses five "continuing obligations" that landowners or occupiers must continue to satisfy to maintain their immunity from liability. If a party satisfies the threshold criteria, it must then comply with the continuing obligations to maintain its immunity from liability. The *Common Elements Guidance* only deals with five of the criteria that a landowner must meet to qualify for these defenses.

One continuing obligation is to comply with land use and institutional controls. The *Common Elements Guidance* says that landowners seeking to qualify for the CERCLA liability relief must comply with the land use restrictions and institutional controls relied on in the response action even if the restrictions and controls were not in place at the time the landowner purchased the property or even if they were not properly implemented. According to the *Common Elements Guidance*, a land use restriction may be considered "relied on" when the restriction is identified as a component of the remedy.

The guidance notes that an institutional control may not serve the purpose of implementing a land use restriction if:

- The land use restriction was not implemented;
- The party responsible for enforcement of the institutional controls neglects to take sufficient measures to bring those persons into compliance; or
- A court finds the controls to be unenforceable.

For example, a remedy might rely on an ordinance that prevents groundwater from being used as drinking water but the local government may fail to enact the ordinance, change the ordinance to allow a use prohibited by the remedy (e.g., drinking water use), or fail to enforce the ordinance. In such circumstances, the guidance indicates that a landowner or person using the property will still be required to comply with the groundwater use restriction to maintain its liability protection.

If the owner/operator fails to comply with a land use restriction relied on in connection with a response action, the guidance says that the EPA might use its CERCLA authority to order the owner to remedy the violation or may remedy the violation itself and seek cost recovery from the owner/operator. The guidance suggests that a party could be deemed to be "impeding the effectiveness or integrity of an institutional control" without actually physically

disturbing the land. The guidance provides these examples:

- Removing a notice that was recorded in the land records;
- Failing to provide a required notice of the existence of institutional controls to a future purchaser of the property; and
- Applying for a zoning change or variance when the current designated use of the property was intended to act as an institutional control. However, the EPA acknowledges that some institutional controls may not need to remain in place in perpetuity, and that an owner may seek to change land use restrictions and institutional controls provided it follows procedures required by the applicable regulatory agency.

For the appropriate continuing care obligation, the guidance simply rephrased the obligation as requiring landowners or occupiers to:

- Take reasonable steps with respect to hazardous substance releases to stop continuing releases;
- Prevent threatened future releases; and
- Prevent or limit human, environmental, or natural resource exposure to hazardous substance releases.

Not surprisingly, the guidance states that a reasonable steps determination will be a site-specific, fact-based inquiry that will have to take into account the different elements of the landowner liability protections. The guidance also indicates that the obligations might differ for landowners depending on the defense that they are relying on because of the differences among the three statutory provisions.

For example, although each defense requires the owner/operator to conduct an "appropriate inquiry," only a BFPP may purchase with knowledge. Thus, the reasonable steps required of a BFPP may differ from those of the other protected landowner categories who did not have knowledge or an opportunity to plan before purchase.

Indeed, a senior official of the EPA suggested at a recent conference that the BFPP arguably has greater responsibility than an innocent purchaser because the BFPP knows about the contamination. The EPA also indicated that although a protected party discovering contamination may not be required to undertake a full environmental investigation, doing nothing in the face of a known or suspected environmental hazard would likely be insufficient. The EPA did state that there were some circumstances where the reasonable steps required of a party may be akin to those of a PRP such as when the only remaining response action is the implementation and maintenance of institutional or engineering controls.

For the cooperation and access continuing obligation, the guidance simply repeats the statutory provision without providing any further clarification.

CERCLA NON-PRIORITY LIEN • Before the 2002 Brownfield Amendments, the EPA was authorized to impose a non-priority lien on property for the full amount of response costs that it incurred at a site and for damage to natural resources against the property of the PRP subject to the cleanup ("CERCLA Non-Priority Lien"). 42 U.S.C. §9607(l).

The lien applies to all of the property owned by the PRP and not just the portion of the site affected by the cleanup. However, the lien is subject to the rights of bona fide purchasers and previously perfected interests in the property so it does not act as a "superlien." 42 U.S.C. §9607 (l)(3).

The lien becomes effective when the EPA incurs response costs or notifies the property owner of its potential liability, whichever date is later. Although the lien was enacted as part of the 1986 Superfund Amendments and Re-

tive law judge to determine if the EPA has a reasonable basis to believe that the statutory criteria for perfecting a lien exist.

The *1993 Lien Guidance* also provides that the EPA may, under exceptional circumstances, perfect a lien before providing the owner with an opportunity to be heard provided that the agency sends a post-perfection notice to the owner immediately upon perfection. The guidance contains a non-exclusive list of "exceptional circumstances" such as imminent bankruptcy of the owner, imminent transfer of all or part of the property, imminent perfection of a secured interest that would subordinate the EPA's lien, or an indication that these events are about to take place. *1993 Lien Guidance* at 5-6.

Standard Of Review

The *1993 Lien Guidance* sets forth the factors that a regional judicial officer should consider in determining whether the EPA has a reasonable basis for believing that the statutory criteria for perfecting a lien exist. These factors include whether:

- The property owner was sent notice of the potential lien by certified mail;
- The property is owned by a PRP;
- The property was subject to a response action; and
- The EPA incurred response costs and any other information that shows that the lien should not be filed.

1993 Lien Guidance at 7.

Because the informal hearing is limited to whether the EPA had a reasonable basis to perfect a lien, the recommendation of the hearing officer does not bar the EPA or the property owner from raising any claims or defenses in later proceedings nor does the recommendation have any binding effect on the ultimate liability of the property owner. *1993 Lien Guidance* at 9.

Because of the relatively low burden that the EPA has to satisfy, the vast majority of informal hearings have upheld the EPA's determination that it may impose a lien on the property.

The only reported informal hearing not upholding the EPA's proposed lien is *In the Matter of Pacific States Steel Removal Site*, CERCLA Probable Cause Determination (Region 9, August 14, 1995). Other hearings have found that removal actions were conducted on non-contiguous parcels because the EPA had at least performed intrusive sampling or located its removal action office on the non-contiguous parcel. As a result, the EPA was allowed to perfect a lien on those other parcels. *In the Matter of Mercury Refining Superfund Site* (Region 2, June 11, 2002); *In the Matter of Maryland Sand Gravel and Stone Company* (Region 3, June 22, 1999). In *Maryland Sand*, the EPA sought to impose a lien on all parcels where the PRP had conducted operations. However, the hearing officer concluded that the EPA had not conducted removal actions on 22 acres but upheld perfection of the lien on the other 61 acres.

WINDFALL LIEN • The 2002 Brownfield Amendments added a second lien provision to make sure that a BFPP does not become unjustly enriched at the taxpayers' expense. Section 107(r) of CERCLA authorizes the EPA to impose a windfall lien on property owned by a BFPP under certain circumstances. 42 U.S.C. §9607(r). Interestingly, section 107(r) does not expressly state that the windfall lien is subject to the rights of holders of previously perfected security interests. To perfect a windfall lien, the EPA must establish three things:

- The EPA has performed a response action;
- The EPA has not recovered its response costs; and
- The response action increased the fair market value of the property above the fair market

value of the facility that existed before EPA initiated the response action.

The windfall lien arises when the EPA incurs its costs but will not be effective until the EPA perfects the lien by filing it in the local land records. The windfall lien continues until it is satisfied by sale or other means, or until the EPA recovers the response costs incurred at the property.

The windfall lien is capped by the amount of unrecovered response costs and will not exceed the increase in fair market value of the property attributable to the response action at the time of a sale or other disposition of the property. This is in contrast to the CERCLA non-priority lien. With a CERCLA non-priority lien, the EPA may file a lien for all of its response costs for a particular site.

The possibility of a windfall can inject uncertainty into a real estate transaction. For example, the EPA is not required to notify a property owner when it incurs costs that may be eligible for a windfall lien. Instead, the windfall lien becomes effective when the EPA incurs costs. Since the windfall lien provision has no statute of limitations, the parties may not know the extent of the EPA's past response costs. In addition, the parties may not know how much of the current property value the EPA may attribute to its response action. Moreover, a purchaser may not know if it qualifies as a BFPP at the time of the closing and, therefore, may not know if is potentially vulnerable to a windfall lien. Finally, a party may inadvertently fail to maintain its status as a BFPP after taking title, thereby nullifying the windfall lien.

In July 2003, the EPA issued its interim windfall lien guidance clarifying when the agency plans to exercise its authority to impose a windfall lien and how it plans to calculate the amount of the windfall lien. "Interim Enforcement Discretion Policy Concerning 'Windfall Liens' Under Section 107(r) of CERCLA," Memorandum from Susan E. Bromm, Director of Site Remediation Enforcement, U.S. the EPA, July 16, 2003, www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf ("*Windfall Lien Guidance*").

The *Windfall Lien Guidance* says that the decision to perfect a windfall lien must be based on site-specific factors. It also gives examples of factors that could influence the EPA's exercise of its enforcement discretion. However, unlike the guidance for the CERCLA Non-Priority Lien, the *Windfall Lien Guidance* does not discuss how or if the EPA intends to notify a BFPP of the existence of a potential windfall lien.

To qualify as a BFPP, a party must not have a "financial relationship" with the seller or a liable party. The *Windfall Lien Guidance* does not really explain what it means by "financial relationship." What if, for example, the seller or one of the liable parties for the site is a publicly traded company and the purchaser owns a non-controlling interest in that entity, does this "financial relationship" disqualify it as a BFPP?

On the other hand, there may be instances when a prospective purchaser may want to forgo its status as a BFPP and expose itself to the risk that it will be a CERCLA liable party or negotiate some other risk-transfer mechanism such as insurance. However, the *Windfall Lien Guidance* does not provide a mechanism for a purchaser to disqualify itself as a BFPP short of deliberately failing to comply with its continuing obligations.

Perfecting The Windfall Lien

In general, the EPA will not perfect a windfall lien if the entire increase in the fair market value ("FMV") of the property was because of a response action performed by the EPA before purchase by the BFPP. *Windfall Lien Guidance* at 4. The EPA will also generally not perfect a windfall lien when the BFPP acquired the property at FMV after the cleanup since there would

not be any windfall to the BFPP. *Windfall Lien Guidance* at 5. If the remedy was devised before acquisition but some response actions must continue after the closing such as operation and maintenance activities, the EPA will not generally perfect a windfall lien for those activities since they would probably not have any effect on the FMV of the property. *Windfall Lien Guidance* at 5. The EPA will also not seek a windfall lien when there is a substantial likelihood that it will recover all of its costs from liable parties such as when it has entered into a consent decree or settlement agreement with the liable party. *Windfall Lien Guidance* at 7.

In addition, the agency will not perfect a windfall lien if it has previously filed a CERCLA non-priority lien and has entered into a settlement with a prior owner to satisfy that lien. *Windfall Lien Guidance* at 11. The EPA expects that a BFPP acquiring a property subject to a CERCLA non-priority lien would resolve the lien as part of the real estate transaction by either settling with the agency or negotiating a reduced purchase price to reflect the value of the CERCLA non-priority lien. If the CERCLA non-priority lien is not resolved at the closing, the EPA says that will probably pursue cost recovery after the closing or commence an in rem action against the property. *Windfall Lien Guidance* at 12.

However, the guidance cautions that there might be times when the EPA may seek to perfect a windfall lien even when the increase in FMV occurred before the BFPP acquisition. Factors that could cause the EPA to perfect a windfall lien under such circumstances include:

- The EPA has substantial unreimbursed costs;
- The EPA's cleanup action resulted in a significant increase in the property's fair market value;
- The EPA cannot identify any viable and liable parties from which it could recover costs, and the response action occurred while a non-liable party owned the property.

For example, a lender qualifying for the secured creditor exemption forecloses on contaminated property while the EPA performed a response action that substantially increased the property's FMV. Under these circumstances, the guidance indicates that the EPA might file a windfall lien, particularly if the lender received sales proceeds that exceeded the value of its security interest. *Windfall Lien Guidance* at 4.

The EPA warned that it might seek to perfect a windfall lien if a party attempted to complete a transaction or series of transactions to avoid CERCLA liability. The *Windfall Lien Guidance* indicates that the EPA will pay particular attention to transactions that:

- Appear to provide a windfall to a BFPP; or
- Appear to be structured to limit the EPA's ability to recover its costs against the seller (e.g., disposing of valuable assets so that the seller no longer has funds to pay the EPA or conveying property to evade perfection of a lien).

If the BFPP did acquire the property below the FMV, the EPA may seek any of the windfall attributable to its response actions. *Windfall Lien Guidance* at 10. For example, suppose the EPA expends $3 million on a site and the cleanup increases the FMV from $1 million to $2 million. A BFPP then acquires the land for $500,000 and the EPA then spends an additional $1 million, which increases the FMV to $2.5 million. Because the BFPP acquired the property below the FMV, the EPA would seek the $1.5 million increase in FMV. *Windfall Lien Guidance* at 9. The *Windfall Lien Guidance* also identifies two kinds of expenditures for which the EPA will generally not perfect a windfall lien even if they result in an increase in FMV:

- The EPA will not perfect a windfall lien for the amount of any brownfield grant or loans awarded for the site. *Windfall Lien Guidance* at 5.
- The agency will not seek a windfall lien when its only costs are for performing a prelim-

inary site assessment or site investigation, and the EPA does not anticipate performing any removal or remedial actions. *Windfall Lien Guidance* at 6.

The agency also indicated that it would not seek to perfect a windfall lien when the BFPP acquires the property for two types of uses.

- The first excluded use is when the BFPP plans to use the property for residential purposes provided that the seller and the BFPP are non-governmental and non-commercial entities (that is, homeowner-to-homeowner sales). *Windfall Lien Guidance* at 6. The EPA said this was consistent with its "Policy Towards Owners of Residential Property at Superfund Sites," Memorandum from Don Clay, Assistant Administrator, Office of Solid Waste and Emergency Response, and Raymond Ludwiszewski, Acting Assistant Administrator, Office of Enforcement (July 3, 1991) (*"Residential Property Owner Policy"*). *Windfall Lien Guidance* at 6n.9.
- The second excluded use is when the BFPP acquires the property to create or preserve a public park, greenspace, recreational, or similar public purpose. However, if the public use is only temporary and then converted to a different use, the EPA may consider perfecting a windfall lien. *Windfall Lien Guidance* at 7.

The EPA may also decline to perfect a windfall lien when:

- Prior enforcement discretion policies might apply to the BFPP. For example, the EPA will not generally perfect a windfall lien against a BFPP that acquires property that would qualify for the residential property owner policy, or that owns property with a contaminated aquifer from an off-site source. www.epa.gov/compliance/resources/policies/cleanup/superfund/contamin-aqui-rpt.pfd.
- The seller has previously been issued a comfort letter from the EPA. *Windfall Lien Guidance* at 7. The EPA cautions that if the seller receives a comfort letter but the EPA subsequently expends significant funds to clean up a site after a BFPP acquired title, the EPA might pursue a windfall lien against the BFPP since the cleanup would not have been anticipated at the time the comfort letter was issued.

The *Windfall Lien Guidance* does not indicate if a statute of limitations applies to the windfall lien. However, the EPA personnel have said informally that the agency does not intend to resurrect all of its "old and cold" costs but only recoup those costs that result in a windfall for the BFPP.

Calculating The Windfall Lien

Generally, the EPA only seeks the increase in FMV attributable to a response action if that increase occurs after a BFPP acquires the property at FMV. The *Windfall Lien Guidance* states that if a CERCLA Non-Priority Lien or a windfall lien has not been filed against the property, BFPPs should be able to take title with the understanding that the EPA will only seek the increase in FMV if the agency subsequently performs a response action. However, the EPA emphasized that if it is required to enforce its windfall lien through litigation, the agency may seek all of its costs and not just those attributable to the increased FMV. *Windfall Lien Guidance* at 8.

Unfortunately, the *Windfall Lien Guidance* does not shed much light on how to calculate the FMV. Instead, the EPA simply states that it will compare the FMV of the site in a clean condition to the FMV at the time of purchase. A number of ways for calculating FMV are in use, but the *Windfall Lien Guidance* does not indicate which of these the EPA plans to use.

In addition, the *Windfall Lien Guidance* does not explain how the agency plans to distinguish between the FMV attributable to a response action and the FMV attributable to market conditions from neighborhood redevelopment pro-

jects. Often, the mere creation of a redevelopment plan for a formerly blighted area can result in increased property values. In a recent conference, EPA representatives said that the EPA does not have any formula that it will use nor does it plan to issue any guidance on the form or content of appraisals that it will use in determining FMV. Instead, the agency will rely on case law, carefully review appraisals, and take a close look at what factors are affecting property valuations.

If the BFPP believes that a post-acquisition EPA-funded cleanup resulted in a potentially large windfall, the EPA recommends that the BFPP obtain a reliable estimate of the property's FMV in its remediated condition. The BFPP should base the estimate on a real estate appraisal by a trained professional, although the EPA suggested that other credible mechanisms for determining the FMV in its clean condition might be appropriate, such as a tax appraisal or information from neutral professional real estate brokers.

The *Windfall Lien Guidance* also discusses the EPA's plans to establish any procedures for contesting FMV estimates. In a recent conference, EPA representatives said that the EPA would try to resolve these disputes through negotiation. If FMV disputes cannot be resolved, the agency would likely send a referral to the U.S. Department of Justice to file a declaratory relief action to determine the FMV.

RESOLVING WINDFALL LIENS • The EPA hopes that the *Windfall Lien Guidance* will limit the need for the agency to become involved in private real estate transactions. However, the agency recognized that site-specific circumstances might require that regional offices issue assurances in some transactions.

The EPA anticipates that the issuance of comfort letters under the EPA's comfort/status letter policy could accomplish this. "Policy on the Issuance of Comfort/Status Letters," Memorandum from Steve A. Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance (November 8, 1996), *reprinted at* 62 F.R. 4,624 (Jan. 30, 1997) *also available at* www.epa.gov/compliance/resources/policies/cleanup/superfund/comfort-let-mem.pfd. However, the *Windfall Lien Guidance* suggests that the EPA would issue such letters only for projects found to be in the public interest or if no other enforcement mechanism was available to address the concerns of the party requesting the assurances from the EPA

Model Settlement Agreement

The EPA and the U.S. Department of Justice have developed a model settlement agreement to facilitate the resolution of windfall liens. The model agreement provides that the federal government will release and waive a windfall lien in exchange for payment of cash or other appropriate consideration such as performance of additional response actions.

Under the agreement, the BFPP must:

- Provide the EPA with an irrevocable right of access and ensure that any tenants or subtenants provide such access;
- File a notice of the agreement in the land records;
- Provide a copy to any tenants or subtenants;
- Require the BFPP and any successors to comply with any land use restrictions or engineering controls;
- Require the BFPP to take all steps necessary for it to maintain its status as a BFPP.

Interestingly, the model windfall lien agreement does not contain a covenant not to sue ("CNTS"), which typically appears in a PPA.

Although the EPA has indicated that it will generally not enter into PPAs, it has issued PPAs when major public interests were involved with the site. Because of the absence of a

CNTS in the model windfall lien agreement, BFPPs of sites where redevelopment is a high priority to local governments should explore the possibility of using a PPA as the mechanism for removing or eliminating a potential windfall lien. In such circumstances, it would be advisable to have the local government contact the EPA about the need for a PPA. The BFPP should also advise the EPA if the key lender for the redevelopment is insisting on a CNTS.

In lieu of the EPA imposing a windfall lien on the property, the EPA may accept a lien on any other property that the BFPP owns or some other assurance of payment in the amount of the unrecovered response costs that is satisfactory to the EPA.

CONCLUSIONS • The BFPP defense is an important tool for encouraging the redevelopment of contaminated sites. However, the windfall lien can inject a degree of uncertainty that could vitiate many of the benefits of the BFPP for unwary purchasers and their lenders. In some cases, the mere threat of a windfall lien may deter some purchasers or lenders from pursuing a redevelopment project.

The absence of procedures for challenging the assertion of windfall liens such as those established for the CERCLA Non-Priority Lien or for settling windfall liens may cause substantial delays that could derail a redevelopment project. In addition, CERCLA does not require the EPA to provide any notice to a property owner before perfecting a windfall lien.

To minimize the disincentives posed by the windfall lien, the EPA should establish notice procedures similar to those created for the CERCLA Non-Priority Lien. Until then, prospective purchasers will have to rely heavily on pre-acquisition due diligence to determine if the EPA has incurred any response costs at a site and if it did, the amount of those costs.

PRACTICE CHECKLIST FOR
Counseling The Client On The CERCLA Windfall Lien

The Small Business Liability Relief and Brownfields Revitalization Act of 2002, ("2002 Brownfield Amendments") adds a bona fide prospective purchaser ("BFPP") defense to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The BFPP defense allows a purchaser knowingly to take title to contaminated property if the purchaser satisfies certain criteria. The defense comes with an important hitch. In certain circumstances, the Environmental Protection Agency ("EPA") may perfect a "windfall lien" on property owned by a BFPP to recover cleanup costs. This lien is to recover the increase in property value attributable to the EPA's cleanup actions.

• The BFPP defense is an important tool for encouraging the redevelopment of contaminated sites. However, the windfall lien can inject a degree of uncertainty that could vitiate many of the benefits of the BFPP for unwary purchasers and their lenders. In some cases, the mere threat of a windfall lien may deter some purchasers or lenders from pursuing a redevelopment project.

• The lack of procedures for challenging the assertion of windfall liens or for settling windfall liens may cause substantial delays that could derail a redevelopment project. In addition, the EPA need not provide any notice to a property owner before perfecting a windfall lien.

— If you represent a BFFP, first determine whether the EPA has performed a response action, whether the EPA has not recovered its response costs, and whether the response action increased the fair market value of the property above the fair market value of the facility that existed before

the EPA initiated the response action. If the answer to these three questions is yes, your client may be subject to a windfall lien.

— If the brownfield may be subject to a windfall lien, carefully research EPA regulatory guidance for the circumstances under which the EPA will seek to enforce a windfall lien. For example, if your client wants to build a residential development or a public park, the EPA may not want to enforce the lien.

— If the brownfield may be subject to a windfall lien and your client or client's lenders or other interested third-parties are concerned about this, you might ask for a letter of assurance from the EPA that the lien will not be enforced. The EPA may issue such a letter if there is an important public interest in the property's development.

— If the brownfield may be subject to a windfall lien, consider using the EPA's model agreement. This provides that the federal government will release and waive a windfall lien in exchange for payment of cash or other appropriate consideration such as performance of additional response actions.

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