CHAPTER 1

CERCLA AND THE BONA FIDE PROSPECTIVE PURCHASER

I. Introduction

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)\(^1\) was enacted “in response to the serious environmental and health risks posed by industrial pollution.”\(^2\) The intent of CERCLA is “to promote the ‘timely cleanup of hazardous waste sites’ and to ensure that the costs of such cleanup efforts [are] borne by those responsible for the contamination.”\(^3\) In endeavoring to accomplish its purpose,

CERCLA imposes strict liability for environmental contamination on four broad classes of [potentially responsible parties]: “(1) the owner and operator of a vessel or a facility, (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of, (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance . . . .”\(^4\)

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3. Id. (quoting Consolidated Edison Co. of N.Y. v. UGI Util., Inc., 423 F.3d 90, 94 (C.A.2 2005)).
4. Id. (quoting CERCLA § 107(a), 42 U.S.C § 9607(a)).
This broad liability scheme, however, is a significant barrier to the redevelopment of brownfield sites. In other words, under CERCLA, “parties can be held liable for the entire costs of cleanup, even if they purchased the property after the contamination occurred or were otherwise innocent parties.” Thus, fearing prolonged entanglements in CERCLA’s liability scheme, developers have been forced to avoid brownfields and, instead, focus on developing green and open spaces. Indeed, CERCLA’s broad liability scheme is “an impediment to the cleanup of even lightly contaminated sites.” In fact, brownfield sites “may lie fallow indefinitely unless someone is willing to take on the risk associated with purchasing contaminated land and has the financial resources to pay for site investigation and cleanup.” This is a major problem because “there are more than 450,000 brownfield sites nationwide that blight . . . communities, pose health and environmental hazards, erode . . . cities’ tax base, and contribute to urban sprawl and loss of farmland.”

In 2001, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Amendments”) to cure this problem. Under the Brownfields Amendments, two provisions were “added to CERCLA to provide protection to persons who wish to purchase contaminated property without incurring [CERCLA] liability.” The “new provisions add a definition of ‘bona fide prospective purchaser’ to CERCLA[‘s] definitions” and amend CERCLA “to exclude persons who qualify as bona fide prospective purchasers from liability under CERCLA.” Specifically, the Brownfields Amendments permit a purchaser of contaminated property to assert a defense to CERCLA liability even if the purchaser acquired the property with knowledge of the property’s contaminated condition. Thus, the Brownfields Amendments address the redevelopment problem created by CERCLA’s broad liability scheme.

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5. CERCLA defines a brownfield site as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence of potential presences of a hazardous substance, pollutant, or contaminant.” CERCLA § 101(39)(A), 42 U.S.C. § 9601(39)(A).
7. Id.
8. Id.
9. Id.
10. Id. at 1.
13. Id. The second provision “provides liability protection for landholders whose property may be contaminated by a contiguous contaminated site if they did not contribute to the contamination and meet other conditions.” Id. at 7.
ity scheme. In other words, the risk a developer confronts under CERCLA is amelio-
rated by establishing oneself as a bona fide prospective purchaser (BFPP). To be
clear, the Brownfields Amendments address, but do not resolve, the redevelopment
problem. This is because while “there is now an avenue by which prospective devel-
opers and investors may be able to protect themselves from liability, the process is
time consuming and [the] transaction costs remain high.”14

II. Qualifying as a Bona Fide Prospective Purchaser

To be eligible for BFPP status, a purchaser must acquire ownership of the facility15 in
question after January 11, 2002.16 Upon acquiring ownership of the facility, a pur-
chaser must also satisfy the following eight criteria—including three “threshold re-
quirements” and five “continuing obligations”—to qualify as a BFPP:

(1) All disposal of hazardous substances at the facility occurred before the person
acquired the facility;
(2) The purchaser made all appropriate inquiries into the previous ownership and
uses of the facility in accordance with generally accepted good commercial
and customary standards and practices;
(3) The purchaser provides all legally required notices with respect to the discov-
ery or release of any hazardous substances at the facility;
(4) The purchaser exercises appropriate care with respect to hazardous substances
found at the facility by taking reasonable steps to—
   a. stop any continuing release;
   b. prevent any threatened future release; and
   c. prevent or limit human, environmental, or natural resource exposure to
      any previously released hazardous substance;
(5) The purchaser provides full cooperation, assistance, and access to persons
that are authorized to conduct response actions or natural resource restoration
at a vessel or facility (including the cooperation and access necessary for the
installation, integrity, operation, and maintenance of any complete or partial
response actions or natural resource restoration at the vessel or facility);

15. 42 U.S.C. § 9601(9) (defining “facility” as ‘(A) any building, structure, installation, equip-
ment, pipe, or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container,
motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has
been deposited, stored, disposed of, or placed, or otherwise come to be located’”).
(6) The purchaser—
   a. is in compliance with any land use restrictions established or relied on in
      connection with the response action at a vessel or facility, and
   b. does not impede the effectiveness or integrity of any institutional control
      employed at the vessel or facility in connection with a response action;

(7) The person complies with any request for information or administrative subpoenas; and

(8) The person is not—
   a. potentially liable, or affiliated with any person that is potentially liable, for
      response costs at a facility through—
      i. any direct or indirect familial relationship, or
      ii. any contractual, corporate, or financial relationship other than a con-
      tractual, corporate, or financial relationship that is created by the in-
      struments by which title to the facility is conveyed or financed or by a
      contract for the sale of goods or services; or
   b. the result of a reorganization of a business entity that was potentially li-
      able. 17

The party asserting the BFPP defense has the burden of proving each of these eight elements by a preponderance of the evidence. 18, 19 In Saline River Properties, LLC v. Johnson Controls Inc., for instance, the court held that Saline River Properties failed to establish the BFPP defense because it did not present evidence on each of the eight elements. 20 As noted, to qualify as a BFPP, a purchaser must acquire ownership of the facility in question after January 11, 2002, the date of enactment of the Brownfields Amendments. 21 In Haskins v. Cherokee Grand Avenue, LLC, the court

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19. A “preponderance of the evidence” standard refers to the standard of evidence under which “[t]he greater weight of the evidence...superior evidentiary weight that, though not sufficient to free the mind wholly from reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” Black’s Law Dictionary 1301 (9th ed. 2009).


held that the BFPP defense was unavailable to the defendants because they purchased the facility before January 11, 2002.\textsuperscript{22}

\textbf{A. DISPOSAL OF HAZARDOUS SUBSTANCES OCCURRED PRIOR TO PURCHASE.}

The first element of the BFPP defense requires the purchaser to prove that disposal of hazardous substances occurred prior to its acquisition of the facility.\textsuperscript{23} Disposal is defined as “the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.”\textsuperscript{24} The Fourth Circuit has held that “disposal” does not necessarily have to be intentional dumping, but may include accidental leaking or spilling.\textsuperscript{25} Further, the Eleventh Circuit has held that a “disposal” may also occur when contaminated soil is dispersed.\textsuperscript{26}

\textbf{B. PARTY PERFORMS ALL APPROPRIATE INQUIRIES.}

The second element of the BFPP defense requires the purchaser to prove that it performed “all appropriate inquiries” (AAI) into prior ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices before acquiring the facility.\textsuperscript{27} It is important that AAI be completed prior to the purchaser’s acquisition of the property.\textsuperscript{28} The American Society of Testing and Materials (ASTM) 1527-05 standard meets this AAI threshold.\textsuperscript{29} As of November 1, 2006, all Phase I Environmental Site Assessments (ESA) must be conducted in compliance with the AAI Final Rule contained in 40 C.F.R. § 312.\textsuperscript{30}

\begin{itemize}
  \item \textsuperscript{22} Case No. C-11-05142-YGR., 2012 BL 80414, at *5 (N.D. Cal. Apr. 2, 2012).
  \item \textsuperscript{24} 42 U.S.C. §§ 6903(3), 9601(29).
  \item \textsuperscript{25} Nurad Inc. v. Wm. E. Hooper Sons Co., 966 F.2d 837, 846 (4th Cir. 1992).
  \item \textsuperscript{26} Redwing Carriers Inc. v. Saraland Apts. Ltd., 94 F.3d 1489, 1511–12 (11th Cir. 1996).
  \item \textsuperscript{27} See 42 U.S.C. § 9601(40)(B); Ashley II, 791 F. Supp. 2d at 499.
  \item \textsuperscript{28} OECA, U.S. EPA, 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 (“COMMON ELEMENTS”) (2003), available at http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf [hereinafter INTERIM GUIDANCE].
  \item \textsuperscript{29} \textbf{BROWNFIELDS LAW AND PRACTICE} § 4.04 (Michael B. Gerrard ed., Matthew Bender 2011) [hereinafter BROWNFIELDS LAW AND PRACTICE].
\end{itemize}
The AAI Final Rule was formed by a Negotiated Rulemaking Committee made up of representatives from more than two dozen stakeholder groups.\textsuperscript{31} The standard for AAI calls for each Phase I ESA to be conducted by an “environmental professional” who meets certain educational and professional standards.\textsuperscript{32} The more specialized and advanced the educational experience, the less professional experience is required.\textsuperscript{33} To qualify as an environmental professional in this context, a person must be current in his or her field and—

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\item be a licensed professional engineer or professional geologist with the equivalent of three years of full-time relevant experience; or
\item be licensed or certified by the state, federal government, or tribe to perform environmental inquiries and has the equivalent of three years of full-time relevant experience; or
\item be a college graduate or higher from an accredited institution in a relevant discipline of engineering, environmental science, or earth science with the equivalent of five years of experience; or
\item have the equivalent of 10 years’ full-time relevant experience.\textsuperscript{34}
\end{enumerate}

The standard permits the environmental professional to supervise those who conduct the AAI, but the environmental professional must sign the final report and include a statement certifying that he or she is an environmental professional and that AAI was developed and performed in conformance with the standards and practices set forth in 40 C.F.R. § 312.\textsuperscript{35}

For an inquiry to be in compliance with AAI standards, the investigation must include:

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\item The results of an inquiry by an environmental professional;
\item Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility;
\item Reviews of historical sources of information, such as chain-of-title documents, aerial photographs, building department records, and land-use records, to determine previous uses and occupancies of the real property since the property was first developed;
\end{enumerate}

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\textsuperscript{31} \textit{Id.} \\
\textsuperscript{32} 40 C.F.R § 312.10(b) (2011). \textit{See Brownfields Law and Practice, supra note 29.}
\textsuperscript{33} \textit{Brownfields Law and Practice, supra note 29.}
\textsuperscript{34} \textit{Id.}
\textsuperscript{35} \textit{Id.}
\end{flushleft}
(4) Searches for recorded environmental cleanup liens against the facility filed under federal, state, or local law;
(5) Reviews of federal state, and local government records, waste disposal records, underground storage tank records, and hazardous waste-handling, generation, treatment, disposal, and spill records concerning contamination at or near the facility;
(6) A visual inspection of the facility and adjoining properties;
(7) Any relevant and applicable specialized knowledge or experience on the part of the purchaser;
(8) A consideration of the relationship of the purchase price to the value of the property if the property was not contaminated as performed by the purchaser;
(9) Commonly known or reasonably ascertainable information about the property; and
(10) A consideration of the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect the contamination by appropriate investigation.  

AAI results must be included in a report that (1) includes a professional opinion regarding the identification of conditions that indicate a release or threatened release on the property, and (2) identifies significant data gaps that affect such an opinion. “Significant data gaps” refer to missing or unattainable information the absence of which affects an environmental professional’s ability to identify conditions indicative of releases or threatened releases of hazardous substances. The report must include information about the significance of these data gaps.

If the inquiry report is more than a year old at the time of the purchase, the inquiry report must be updated. In addition, certain information must be kept current within 180 days of the purchase, such as (1) interviews with past and present owners, operators, and occupants; (2) searches for recorded environmental liens; (3) reviews of federal, tribal, state, and local governmental records; (4) visual inspections of the property and of adjoining properties; and (5) execution of the declaration required by the environmental professional. The report may include information from previous assess-
ments as long as it is not more than one year old. If the information is more than one year old, it must be updated to reflect current information.\textsuperscript{42}

Although AAI standards are strict, the court in Ashley II of Charleston, LLC v. PCS Nitrogen, Inc. found that despite inconsistencies in the Phase I Report, the inquiry report met the AAI standard.\textsuperscript{43} The court held that the inconsistencies lacked significance, since the purchaser acted reasonably, hired an expert, and relied on the expert to perform his job properly.\textsuperscript{44}

\section*{C. PARTY PROVIDES ALL LEGALLY REQUIRED NOTICES.}

The third element of the BFPP defense requires any person in charge of a facility to provide all legally required notices with respect to the discovery or release of any hazardous substance at the facility.\textsuperscript{45} The party must immediately notify the National Response Center of a release of a hazardous substance once it has knowledge of such a release.\textsuperscript{46} Congress intended this requirement to ensure that the U.S. Environmental Protection Agency (EPA) and other entities are made aware of releases of hazardous substances in a timely manner.\textsuperscript{47} This notice requirement is an ongoing obligation and includes, but is not limited to, all notices required under federal, state, and local laws.\textsuperscript{48}

\section*{D. PARTY EXERCISES APPROPRIATE CARE BY TAKING REASONABLE STEPS.}

The fourth element of the BFPP defense requires the purchaser to prove that it exercised appropriate care with respect to hazardous substances by taking reasonable steps to (1) stop any continuing release; (2) prevent any threatened future release; and (3) prevent or limit human, environmental, or natural resource exposures.\textsuperscript{49} This requirement is designed as an incentive for owners of contaminated properties to avoid CERCLA liability by acting responsibly with regard to hazardous substances on their property.\textsuperscript{50} According to the EPA, the congressional intent was for the “reasonable steps” requirement to be “consonant with traditional common law principles and the

\begin{footnotes}
\footnote{42}{Id.}
\footnote{43}{791 F. Supp. 2d 431, 500 (D. S.C. 2011). On April 4, 2012, the Fourth Circuit Court of Appeals in PCS Inc. v. Ashley II of Charleston LLC, __ F.3d __, 2013 WL 1340018 (4th Cir. 2013), affirmed the decision of the district court.}
\footnote{44}{Id.}
\footnote{46}{42 U.S.C. § 9603(a). See Ashley II, 791 F. Supp. 2d at 500.}
\footnote{47}{INTERIM GUIDANCE, supra note 28.}
\footnote{48}{Id.}
\footnote{50}{INTERIM GUIDANCE, supra note 28.}
\end{footnotes}
existing CERCLA due care requirement.” 51 Under the existing CERCLA “due care” requirement, a party must establish that it “exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts or circumstances.” 52 At the very least, “doing nothing in the face of a known or suspected environmental hazard would likely be insufficient.” 53

The EPA’s Interim Guidelines on BFPP status states that:

The pre-purchase “appropriate inquiry” by the [BFPP] will most likely inform the [BFPP] as to the nature and extent of contamination on the property and what might be considered reasonable steps regarding the contamination—how to stop continuing release, prevent threatened future releases, and prevent or limit human, environmental, and natural resource exposures. Knowledge of contamination should be factors in evaluating what are reasonable steps, and could result in greater reasonable steps obligations for a [BFPP]. 54

E. PARTY PROVIDES FULL COOPERATION, ASSISTANCE, AND ACCESS.

The fifth element of the BFPP defense requires the purchaser to prove that it provided “full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility.” 55 This includes providing cooperation and access necessary for the installation, integrity, operation, and maintenance of any response action or natural resource restoration at the facility. 56 In Ashley II, the court found that the current landowner, Ashley II of Charleston, LLC (Ashley), established full cooperation by demonstrating ongoing cooperation with the EPA. In that instance, Ashley had immediately notified the EPA of its ownership and asked if any specific action should be taken. 57

51. Id.
52. Id.
53. Id.
54. Id.
56. INTERIM GUIDANCE, supra note 28.
F. PARTY COMPLIES WITH LAND-USE RESTRICTIONS AND DOES NOT IMPEDE THE EFFECTIVENESS OR INTEGRITY OF INSTITUTIONAL CONTROLS.

The sixth element of the BFPP defense requires the purchaser to prove that it (1) is in compliance with any land-use restrictions established or relied on in connection with the response action at a facility; and (2) is not impeding any institutional control employed at the facility in connection with a response action.\footnote{58} Given that institutional controls are often used to implement land-use regulations, failure to comply with a land-use restriction will often impede the integrity of an institutional control and vice versa.\footnote{59} Institutional controls are administrative and legal controls that minimize the potential for human exposure to contamination and protect the integrity of remedies by limiting land use.\footnote{60} The EPA employs the use of institutional controls whenever contamination precludes unlimited and unrestricted use of the facility.\footnote{61} Institutional controls often require a property owner to implement the controls by, for example, conveying an easement or restrictive covenant to a governmental entity and providing that party with the right to enforce a land-use restriction.\footnote{62}

Impeding an institutional control does not require a physical disturbance or disruption of the land.\footnote{63} Some examples of impeding institutional controls include removing a notice that the EPA placed in the land records, failing to give notice of any institutional controls on the property to a purchaser of the property, applying for a zoning change when the current designated use of the property is intended to act as an institutional control, or refusing to assist in the implementation of an institutional control by failing to record a deed notice or refusing to record an easement or covenant.\footnote{64} In \textit{Ashley II}, the court found that Ashley satisfied its burden of proving this element by providing witness testimony of compliance with existing controls.\footnote{65} Ashley also demonstrated that there were no land-use restrictions or unusual institutional controls in place at the site.\footnote{66}

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60. \textit{Id}.
61. \textit{Id}.
62. \textit{Id}.
63. \textit{Id}.
64. \textit{Id}.
66. \textit{Id}.
}
G. PARTY COMPLIES WITH REQUESTS FOR INFORMATION OR ADMINISTRATIVE SUBPOENAS.

The seventh element of the BFPP defense requires the purchaser to prove that it complied with any requests for information or administrative subpoenas. In Ashley II, the court found that Ashley sufficiently proved this element because it complied with all information requests and subpoenas it received from the EPA.

H. PARTY IS NOT AFFILIATED WITH PERSONS THAT ARE POTENTIALLY LIABLE FOR RESPONSE COSTS AT THE FACILITY.

The eighth element of the BFPP defense requires the purchaser to prove that it is not (1) potentially liable for response costs at the facility through: (a) any direct or indirect familial relationship; (b) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or (2) the result of a reorganization of a business entity that was potentially liable. In evaluating which affiliations are prohibited under CERCLA, the EPA has advised courts to consider congressional intent to prevent transactions structured to avoid liability. “Affiliations” has a broad definition that includes direct and indirect familial relationship, and contractual, corporate, and financial relationships.

In Ashley II, the court viewed Ashley’s contractual release of the previous owners of the facility as efforts to discourage the EPA from recovering response costs from them, and found it to be a prohibited affiliation. Accordingly, the court also found that Ashley was potentially liable for response costs at the site. Thus, a purchaser’s indemnity of the seller for pre-closing releases to the environment can preclude a purchaser from asserting a BFPP defense.

The extent to which the availability of the BFPP defense actually contributes to the redevelopment of brownfields is contingent upon the ease with which purchasers can establish the required elements. In fact, it is in the courtroom where it will be

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71. Interim Guidance, supra note 28.
73. Id.
determined whether a purchaser in any specific case has met the elements of the BFPP defense, and this determination will require a careful, fact-specific analysis of each of the elements. Accordingly, the remaining chapters discuss in detail each of these elements. Nevertheless, to establish the elements necessary to successfully assert the BFPP defense will require a prospective purchaser to expend a remarkable amount of time, effort, and expense.

76. 42 U.S.C. § 9601(40).