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COUNTERPOINT ON THE NEW ASTM PHASE II ENVIRONMENTAL SITE ASSESSMENT STANDARD: A FLEXIBLE AND ADAPTABLE DUE DILIGENCE TOOL

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Writing in the January 2011 ETAB Newsletter, Amy Edwards expressed concern that proposed changes to ASTM standard E1903 for Phase II Environmental Site Assessments "would impose drastic new obligations" on parties that commission assessments, and "likely increase the time and cost for completing environmental due diligence."

As chair of the ASTM Task Group responsible for the pending revisions, I believe these concerns are overstated. Certainly the revised standard, now progressing through final steps toward formal adoption, explains the assessment process in greater detail than the standard it will supersede. For the most part, however, the revised standard articulates concepts implicit and even essential in sound assessment practice. By stating them plainly, and by requiring clear communication among the "Users" who commission Phase II assessments and the "Producers" who perform them, the standard promotes clarity and transparency. By providing flexibility to tailor assessments to the information needs of the parties, the proposed standard should foster efficiency in site assessments.

The Revision Process and the Issues Addressed

The new standard results from the regular ASTM process for reviewing and updating standards. The committee having jurisdiction over a given standard—in this case, Committee E50 on Environmental Assessment, Risk Management and Corrective Action—forms a task group to review and consider changes. The full committee votes on proposed revisions. If any member casts a negative ballot, the task group must review the ballot and the voter's rationale, confer with the voter, and either revise the standard to resolve the voter's concern or prepare a "not persuasive" finding for a separate committee ballot. The standard may be balloted, revised, and re-balloted multiple times.

Following this course, the E1903 Task Group worked for several years and conducted four ballots between 2008 and 2010. The review process and successive ballots revealed several interrelated major themes.

First, it became clear that Phase II assessments are done for many reasons unrelated to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability or liability protections. The CERCLA focus of the existing standard therefore no longer made sense. It thus became a fundamental assumption of the revision process that the standard had to be flexible enough to adapt to the full spectrum of assessment objectives.

Second, it became clear that there is considerable diversity among parties for whom assessments are

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performed. Particularly between commercial transaction parties and commercial lenders, "User perspective" cleaves dramatically on the question of whether to define a default scope of work. Lender Users supported an early revision that called for Phase II assessment of all known or potential release areas—in essence, any "recognized environmental condition" under the Phase I standard—while allowing "targeted" assessments where appropriate to the needs of the parties. Lenders thought this approach solved a perceived problem with lack of uniformity in Phase II assessment reports. Transactional Users expressed concern, however, that a default "all releases" scope would oblige them to undertake assessments broader than needed to satisfy their individual information needs or risk tolerance, with the added disadvantage of tainting anything less as somehow lesser and inferior. The revision process synthesized these two perspectives: rather than prescribing a default scope, the proposed standard requires User and Assessor to confer at the outset to define the objectives of the assessment—and requires the resulting "statement of objectives" to be clearly stated in the Phase II report so that other readers such as lenders will at least be clear on what the assessment actually addressed and whether it addresses the issues of concern to them.

Third, the task group concluded that E1903 should be a mandatory "standard practice" rather than an advisory "standard guide." In each ballot, and among the negatives ultimately submitted for a "not persuasive" vote, this conclusion was challenged on the basis that the variability of Phase II site assessments—particularly in light of the revisions allowing Users to define objectives—precluded the kind of standardization needed to justify the "practice" designation. Ultimately the task group was persuaded that a "standard practice" could meaningfully define a mandatory approach to the "how" of assessment activities even while affording Users flexibility to tailor the "what" of assessment objectives to their particular needs.

These examples illustrate the iterative nature of a revision process that went through numerous drafts, in-person and online task group meetings, and extensive consultation with negative balloters. The final E50

Committee ballot in December 2010 yielded 98 percent affirmative votes. Consultation and minor editorial changes reduced eight negative ballots to three. At this writing, the three unresolved negatives are the subject of a ballot on "not persuasive" findings.

The Revised E1903 Phase II Standard: A Preview

The revised Phase II standard essentially defines a framework for thinking about the site assessment process.

The mandatory initial step is to decide what the assessment is about—that is, what it seeks to accomplish, expressed as the objective or the question to be answered. The standard requires the User and Assessor to confer and reduce that goal to a written "statement of objectives." The scope of work for assessment activities is then developed to achieve those objectives. The objectives provide the nucleus of the assessment process and the yardstick by which progress is measured.

The Edwards article expressed concern about this requirement, noting that the consultation requirements of the Phase I standard have already proved challenging to implement. This is a fair concern and may also be a challenge in implementing the revised Phase II standard. But the consultation requirement is indispensable if the standard has no default scope of assessment. The assessment would otherwise be a meaningless exercise—a journey without a destination.

Once objectives are defined, the revised standard orients the assessment process around the scientific method. A key element of this approach is the "conceptual model," which requires the assessor to hypothesize how "target analytes" (the substances of interest in relation to the stated objectives) would have been released and would have migrated in site soil or groundwater. This step assures that assessment activities are appropriately directed and increases confidence that if the substances sought are not found, there is a sound basis for concluding that they are most likely not there. The conceptual model provides a framework for evaluating whether sufficient data have been collected to answer the question, or whether actual results are so at odds with assumptions as to require the assessor to rethink the conceptual model itself in order to understand site conditions. In essence, the conceptual model embodies the scientific paradigm of testing a hypothesis against experimental data.

The Edwards article expresses concern about the complexity of the standard's provisions regarding the conceptual model and its use in the assessment process. The standard is only as detailed as it needs to be, however, to provide meaningful guidance in complex situations. It therefore details implementation steps to a degree that may seem overly complex, time-consuming, and expensive for all situations. To avoid misunderstanding on this score, the standard was revised over the course of the balloting process to clarify that its procedures are to be implemented "in the manner and level of detail appropriate to achieving the objectives [of the assessment]." Thus, while an assessment designed to achieve full characterization of a complex site could benefit from the finer details contained in the standard, the model and assessment process can be "right-sized" for simpler sites, objectives, or environmental settings.

Finally, the revised standard requires a written report that states the results of the assessment activities in relation to the objectives defined at the outset. The requirement of a writing integrating these elements promotes clarity for all Phase II readers. In particular, it minimizes the potential for confusion among readers with diverse concerns and risk tolerance. If objectives are plainly stated, a positive outcome in relation to a narrow purpose cannot be misconstrued as an overall "clean bill of health."

Process Rationalization Rather than "Drastic Change"

Overall, the revised Phase II standard reconciles diverse viewpoints about the site assessment process. It allows Users to define objectives in relation to their needs, but it does require them to be clear about objectives and engage with the assessment process. It makes no radical changes in how assessments are planned or conducted, but it does articulate

sometimes-unspoken assumptions about methods and interpretation of results.

The Edwards article expresses concern that, "for the user, it will no longer be sufficient to simply request that a Phase II ESA be conducted." It asks a number of questions around the problem of conducting the assessment without User cooperation. What if the User won't articulate objectives? How can the assessor prepare a conceptual model and sampling plan if the user won't identify the question to be answered?

To put these issues in perspective, it is helpful to set the standard aside and contemplate how assessment activities would proceed without User involvement in defining objectives. Someone will ask for "a Phase II." Some sort of field work will be conducted. Some sort of report will be generated with the words "Phase II" in the title. When interested parties focus on the environmental condition of the site, they may well find the results unsatisfactory or incomplete in relation to needs they now realize they have.

In the revision process, these possibilities were seen as characteristics of unsatisfactory assessment practice. To say the revised standard discourages them is therefore no criticism. On the contrary, the input of diverse stakeholders in the revision process revealed that the lack of focus in Phase II site assessments is a frequent source of frustration and confusion—and more importantly, a factor in compromising the very utility of the assessment process. In stating an expectation of clarity in these matters, the revised standard reflects what the task group considered to be essentials of a rational site assessment process.

The Edwards article actually illustrates the problem in asking what the assessor should do "if the user fails to cooperate in . . . identifying any limitations on the scope because of schedule, cost, or budget considerations." Do our clients ever turn environmental engineers loose on Phase II assessments without talking about the budget or schedule? It is difficult to picture how an assessor could be blamed for failing to abide by *undisclosed* schedule or cost constraints. ("You exceeded a budget cap I didn't tell you about.") No doubt it would be a problem if the "user fails to cooperate" in any of the ways the Edwards article mentions. But such behavior would be a problem with or without this standard. It is no defect that the standard does not accommodate total disengagement from the assessment process.

Conclusion

The paradoxical challenge of the Phase II revision process was to define a "standard" approach to performing activities that are nonstandard in objectives and scope. The solution reflective of better practice, and perhaps even prevailing practice, is to start with the purpose and means of the assessment. With objectives defined, the conceptual model and the scientific method provide intellectual discipline and methodological coherence for assessment activities. A written report makes the objectives and conclusions of the assessment clear to any interested parties.

In the abstract, none of these ideas is radical. If the new E1903 standard innovates, it is principally in integrating them into a coherent whole. To that extent, it embodies nothing more than a purposeful way of thinking about effective and useful assessment practice. It should be a welcome addition to the due diligence tool kit.

A DECADE (ALMOST) OF LIABILITY PROTECTION UNDER THE BROWNFIELDS AMENDMENTS

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On January 11, 2002, President Bush signed the Small Business Liability Relief and Brownfields Revitalization Act. This law, the Superfund Amendments and Reauthorization Act of 1986,[i] and the 1996 lender liability amendment[ii] have been the only significant changes to the liability regime of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) since its enactment. Title II of the law is known as the Brownfields Revitalization and Environmental Restoration Act of 2001, commonly referred to as the "Brownfields Amendments." The primary purpose of the Brownfields Amendments was to encourage brownfields redevelopment by mitigating the perceived risk of CERCLA liability.[iii] To effect this purpose, the Brownfields Amendments provided new and expanded liability protections for purchasers of contaminated property.

Almost a decade has passed since the Brownfields Amendments became law. During this time, countless underutilized sites have been redeveloped throughout the nation. To a large extent, the law has succeeded in accomplishing its purpose of encouraging brownfields redevelopment. At the same time, purchasers of contaminated property have often met hurdles in relying upon the liability protections afforded by the law.

Significant Changes Under the Brownfields Amendments

Before enactment of the Brownfields Amendments, purchasers of contaminated property relied upon the "innocent purchaser defense" under CERCLA. That defense required an owner of contaminated property to prove the relatively rare fact pattern in which the owner made "all appropriate inquiry" prior to purchasing the property and, despite making such inquiry, failed to identify any contamination. The purpose of "all appropriate inquiry" was thus to identify possible contamination so that cleanup liability could be avoided. The market largely became comfortable working with successive versions of the ASTM E1527 "Phase I ESA" standard, but until the Brownfields Amendments, neither CERCLA nor the U.S. Environmental Protection Agency (EPA) had ever defined "all appropriate inquiry."

On November 1, 2005, as directed by Congress, EPA promulgated its All Appropriate Inquiry rule (AAI rule) at 40 C.F.R. part 312. The final AAI rule was the result of EPA's lengthy negotiations with a variety of stakeholders, including lenders, real estate developers, environmentalists, and consultants. On November 21, 2005, ASTM updated its Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process (ASTM E1527-05), and EPA announced that E1527-05 was consistent with the new AAI rule.

Endorsing an all appropriate inquiry standard was secondary to the real revolution represented by the Brownfields Amendments, which was shielding from liability a buyer who takes title to a property with knowledge that actionable contamination is present. Under the Brownfields Amendments, a "bona fide prospective purchaser" (BFPP) whose potential liability is based solely on the purchaser's status as an owner or operator of a facility can remain free of liability for CERCLA cleanup costs as long as he or she can prove that, among other things, disposal occurred prior to acquisition and the party completed "all appropriate inquiry" and exercised appropriate care by taking reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit human, environmental, or natural resource exposure to hazardous substances. The Brownfields Amendments also expanded the existing innocent purchaser defense and provided a defense similar to the BFPP provisions for contiguous property owners whose neighbors cause pollution that moves onto their properties. So while the scope of the all appropriate inquiry standard changed only slightly as a result of the Brownfields Amendments, the purpose of the all appropriate inquiry evolved to include determining whether environmental risks at the

property could be managed responsibly short of a complete cleanup.

After almost a decade since the law's enactment, certain observations can be made concerning a purchaser's reliance upon the liability protections afforded by the Brownfields Amendments.

Obtaining the Liability Protections Provided by the Brownfields Amendments Is No Simple Task

To clarify the innocent purchaser, BFPP, and contiguous property defenses, EPA published the 2003 guidance document "Common Elements Guidance" (Guidance).[iv] According to the Guidance, in addition to the completion of all appropriate inquiry, the three protections have certain common threshold and continuing obligations. For example, under all three protections, a party has continuing obligations to, among other things, comply with land use restrictions, not impede engineering controls, and "implement reasonable steps with respect to hazardous substances." Unfortunately, the Guidance provides no clear insight into what is required to satisfy many of the statutory criteria outlined in the Brownfields Amendments, for example, a landowner's obligation to take reasonable steps with respect to hazardous substances.

Two recent opinions, both in private party lawsuits, illustrate both the complicated analysis required to evaluate whether a party is a BFPP and how the determination is fraught with highly subjective factors. In *Ashley II of Charleston, LLC v. PCS Nitrogen,* a purchaser of property in Charleston, South Carolina, filed an action pursuant to section 107 of CERCLA to recover costs to remediate arsenic, lead, and other contaminants.[v] The court determined that the purchaser was not a BFPP, in part because after acquisition and demolition of the building on-site, the purchaser allowed hazardous substances to leak from concrete sumps overflowing with rainwater.

In *3000 E. Imperial, LLC v. Robertshaw Controls, Co.*, a purchaser of property in Lynwood, California, filed suit against a former owner to recover costs incurred during remediation of trichloroethylene and benzene from leaking underground storage tanks discovered during the purchaser's due diligence.[vi] The purchaser implemented the cleanup with the oversight of California's Department of Toxic Substances Control, which deemed the purchaser to be a BFPP. The court rejected the defendant's claim that the purchaser lost its BFPP protection because it waited two years after its purchase to remove the underground storage tanks, noting that the purchaser took reasonable steps to stop any continuing leak and prevent any future leaks by promptly emptying the tanks after discovering they contained solvents.

Both the *Ashley* and *3000 E. Imperial* cases illustrate how a buyer's liability status, which was formerly fixed at the point in time that the buyer acquired the property, has come to involve a more complicated inquiry in which the buyer's duties are subject to continuous reevaluation as the property is redeveloped or as more information becomes known.

The Due Diligence All Appropriate Inquiry Standard Is Continuously Evolving

By separating ownership of contaminated property from CERCLA liability under certain circumstances, the Brownfields Amendments replaced a checklist style of environmental due diligence with an ever-evolving all appropriate inquiry standard and a focus on how to best manage environmental risks on a contaminated site. In 2008, ASTM published E2600-08, a vapor intrusion screening standard designed to address the increasing incidents of vapor intrusion and to provide a framework for assessing potential risk. A revised standard, ASTM E2600-10, was published in June 2010, focusing solely on screening for the likelihood that migrating vapors will encroach upon a target property. In addition, although not explicitly required by the AAI rule or ASTM's E1527-05 standard, many environmental professionals now include assessments for asbestos, lead-based paint, and drinking water quality in their due diligence evaluations.

Even with Liability Protection Under the Brownfields Amendments, Cost Recovery Remains a Challenge

Virtually every state in the nation has developed its own program to promote the redevelopment of brownfields. While voluntary cleanup programs (VCPs) vary from state to state, the primary components of a VCP include flexible remediation standards, engineering and institutional controls, and a covenant not to sue. VCPs have become an integral tool in encouraging the purchase and remediation of abandoned or underutilized properties, but a purchaser's ability to recover voluntarily incurred cleanup costs from a responsible party has been affected in one important way. In 2005, the U.S. Supreme Court held that a potentially responsible party (PRP) is not entitled to bring a contribution action against other PRPs under section 113 of CERCLA unless it is first sued under section 106 or 107 of CERCLA or enters into an administrative settlement or judicial order.[vii] Although most courts have held that a brownfields redeveloper may pursue a section 107(a) CERCLA cost recovery claim, section 107(a) is a substantially bulkier tool that effectively demands a counterclaim in which a plaintiff will be forced to litigate its BFPP status.

Conclusion

The BFPP provisions of the Brownfields Amendments removed a significant impediment to brownfields redevelopment, but prospective purchasers of contaminated property remain confronted by complicated issues and uncertainty as they seek to identify, assess, and manage environmental liabilities in brownfields transactions.

Endnotes

[i] Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of CERCLA, 42 U.S.C. §§9601–75 (1988)).
[ii] Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–462 (1996) (codified in scattered sections of CERCLA, 42 U.S.C. §§9601–75 (1997)).
[iii] S. Rep. 107-002, at 2–3 (2001).
[iv] Memorandum from S. Bromm, Office of Site Remediation and Enforcement, U.S. Environmental Protection Agency, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchase, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003).
[v] *Ashley II of Charleston, LLC v. PCS Nitrogen*, 2010 WL 4025885 (D.S.C. 2010).
[vi] *3000 E. Imperial, LLC v. Robertshaw Controls, Co.*, 2010 WL 5464296 (C.D. Cal. 2010).
[vii] *Cooper Industries v. Aviall Services, Inc.*, 543 U.S. 157 (2004).

FEDERAL COURTS ISSUE FIRST INTERPRETATIONS OF BFPP DEFENSE

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Two federal district court decisions rendered in the latter part of 2010 offer the first published judicial interpretations of the bona fide prospective purchaser (BFPP) defense to Comprehensive Environmental Response, Compensation, and Liability (CERCLA) liability. This article presents a brief overview of the decisions reached by the U.S. District Courts for South Carolina and the Central District of California, respectively, in *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, No. 2:05-cv-2782-MBS, 2010 U.S. Dist. LEXIS 104772 (D.S.C. Sept. 30, 2010), and *3000 East Imperial, LLC v. Robertshaw Controls Co.*, No. CV-08-3985 PA, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. Dec. 29, 2010).

The 2002 "Brownfield Amendments" to CERCLA included the addition of a new defense to liability for BFPPs, set forth in CERCLA section 107I. In brief, a prospective purchaser that (1) conducts "all appropriate inquiries" (AAI); (2) meets various continuing obligations; and (3) is not a liable party or affiliated with a liable party, has a defense against a claim for cleanup liability or recovery of response costs based solely on the person's status as an owner or operator of contaminated property. Additionally, the BFPP defense is available only where the purchaser can prove that all disposal occurred before the purchaser acquired the facility A primary purpose of the brownfield amendments and the creation of the BFPP defense was to facilitate the purchase, redevelopment, and return to productive use of brownfield properties impacted by releases of hazardous substances resulting from historical industrial activities.

The two federal court decisions discussed in this article are readily distinguishable, both as to factual complexity and in the courts' respective legal analyses. While difficult to reconcile in some respects, these cases do offer useful guidance to prospective purchasers of brownfield properties – and to some extent a cautionary tale for lawyers advising prospective purchasers of brownfield properties. The cases are summarized below.

Ashley II. The plaintiff in *Ashley II* was Ashley II of Charleston, LLC (Ashley), an affiliate of a brownfield redeveloper. Ashley purchased 30 acres of a 43-acre site that had been operated for many years for the manufacture of fertilizer. Soil and groundwater at the subject property had been contaminated by arsenic and lead, largely as the result of on-site disposal of pyrite slag. The site also contained low-pH conditions and polycyclic aromatic hydrocarbons, also attributable to pyrite slag. The site had been evaluated by both the U.S. Environmental Protection Agency (EPA) and the South Carolina Department of Health and Environmental Control. EPA determined that the site met the requirements for a non-time-critical removal action under the National Contingency Plan, and published a remediation plan for the site.

According to the court's findings of fact, the principals of Ashley included Cherokee Investment Partners, an investment fund that had dedicated $1 billion to the redevelopment of brownfield properties. At the time of the litigation, Cherokee had invested over $50 million in the Magnolia Development, of which the former fertilizer site was to be part. Ashley's role in the venture was to oversee environmental aspects at all properties comprising the Magnolia Development, including the subject site.

After conducting due diligence that the court determined to be sufficient to satisfy AAI, Ashley initially acquired most of the subject site in November 2003. In 2008, Ashley acquired an additional three acres, bringing its total ownership to 30.67 acres. Ashley continued to investigate the site and to work with EPA following the purchase, including the development of remedial alternatives.

In 2005, Ashley filed a CERCLA cost-recovery action against PCS Nitrogen, a successor in interest to a prior owner/operator that ran the fertilizer plant from 1966 to 1972. In its complaint, Ashley sought recovery of

$194,000 incurred for response activities and a declaration that PCS was jointly and severally liable for the cost of remediating the site, then estimated to range from $8 million to $9 million. PCS filed CERCLA contribution claims against Ashley and numerous other prior owner/operators and their affiliates, many of whom in turn counterclaimed and cross-claimed against PCS.

The resulting litigation was lengthy and complex, ultimately culminating in a 107-page opinion and order that, among other things, included an evaluation of Ashley's position that it had no liability under CERCLA for the cleanup by virtue of its status as a BFPP. The court determined that even though Ashley had satisfied most of the conditions for BFPP status—including conducting AAI—Ashley nevertheless did not qualify as a BFPP.

The court found that Ashley had met its burden to establish, by a preponderance of the evidence, only five of the eight elements of the BFPP defense: Ashley properly conducted AAI, provided all required notices, cooperated with EPA, complied with institutional controls, and complied with information requests and subpoenas. The court concluded that Ashley had not proven its entitlement to the remaining three requirements for a BFPP:

1. Ashley failed to prove that no disposal occurred after its purchase of the site.

2. Ashley did not exercise appropriate care with regard to hazardous substances. These two elements are addressed separately in the opinion and order, but the court's analysis cites largely the same considerations for each. The court's evaluation of these elements was based on several factors, but the dominant one was Ashley's decision to leave in place various concrete pads, sumps, a trench, and underground piping left over from a prior operation. Ashley's demolition of certain buildings at the site allowed storm water runoff to collect in, and overflow from, the pads, the sumps, and the trench. (It is unclear from the opinion whether overflow actually occurred or was identified as a likely risk.) The record showed that Ashley had developed, but failed to follow, a demolition protocol requiring the removal of slabs and inspection for subsurface environmental impact. In addition, Ashley acknowledged its awareness of "midnight dumping" at the property after its purchase (although there was evidence that Ashley had erected fencing and provided for security). Ashley also left in place, for a time, a debris pile containing materials that were later manifested out as hazardous waste. The court concluded that Ashley had not met its burden of proof to demonstrate that (i) no disposal occurred on the site after its acquisition, and (ii) it had exercised appropriate care with respect to hazardous substances.

3. The court concluded that (i) Ashley was a liable party under CERCLA, and (ii) Ashley's "affiliation" with other parties rendered BFPP status unavailable to Ashley.

   The court made two separate findings in order to conclude that Ashley failed to satisfy the statutory criteria for BFPP status set forth in CERCLA section 101(40)(H), which is titled "no affiliation":

   A. The first finding consists of a single sentence: "As the current owner of the Site on which hazardous materials are still leaching through the soil, Ashley can be held liable for response costs." Viewed in light of the information provided in the opinion and order, the court's conclusory statement about ongoing leaching seems exaggerated. More troubling is the court's suggestion that the mere fact of continuing subsurface leaching or migration automatically renders a buyer ineligible for BFPP status. The purpose of the BFPP defense is to permit a buyer, subject to the conditions set forth in the statute, to purchase contaminated property without taking on traditional strict CERCLA cleanup liability. It is axiomatic that at some

level, subsurface conditions, including hazardous substances, are neither static nor immobile. The BFPP provisions of CERCLA require proof that there has been no post-purchase *disposal* of hazardous substances—language that suggests deliberate action. *Cf. Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 2009 U.S. LEXIS 3306 (2009). By contrast, the court in *Ashley II* indicates that hazardous substance migration or leaching alone may be regarded as "disposal" for purposes of precluding BFPP status for a purchaser of impacted property.[1] The *Ashley II* decision suggests that unless a purchaser can bear the extremely difficult burden of proving the *absence* of movement of hazardous substances, it cannot secure liability protection as a BFPP. This reasoning works a harsh result, and seems to work against the purpose and goals of the 2002 Brownfield Amendments.

B. The court's second finding relates to Ashley's environmental indemnity obligations to certain other parties to the litigation that had sold portions of the site to Ashley. According to the opinion and order, Ashley's purchase agreements with certain parties included indemnity covenants in favor of the sellers. It appears from the opinion that at some point Ashley sought to intercede with EPA on behalf of the indemnitees. Under the indemnity arrangements described in the opinion, Ashley would have been obligated to reimburse attorney fees, consulting fees, or other costs incurred by the indemnified parties to respond to or defend a demand or claim by EPA. Accordingly, any efforts by Ashley to forestall such unnecessary expenditures appear merely prudent in Ashley's own interests, as opposed to a prohibited affiliation depriving Ashley of BFPP status. Nevertheless, the court condemned Ashley's contact with EPA as evidence of "just the sort of affiliation Congress intended to discourage." This was cited by the court as an additional rationale for denying BFPP status to Ashley.

Indemnification covenants are vital tools that enable unrelated parties in arms-length transactions to allocate risk and cost. Hopefully *Ashley II* does not stand for the general proposition that any such arrangement may cast doubt on a purchaser's eligibility to claim BFPP status.

***3000 East Imperial*.** In contrast to *Ashley II*, the *East Imperial* case presents a simpler and more typical factual background. The plaintiff purchased the subject property in 2006 after conducting AAI which documented some level of contamination. The plaintiff continued to investigate the property after the purchase, and ultimately determined that site soils and groundwater were impacted with trichloroethylene (TCE), benzene, and other hazardous substances. One source of the TCE contamination was a nest of underground storage tanks (USTs).

The plaintiff, 3000 East Imperial, LLC, sued defendant Whittaker, a prior owner and operator, asserting a variety of claims including cost recovery under CERCLA. Whittaker counterclaimed asserting CERCLA cost recovery and contribution claims. The counterclaims asserted that the plaintiff, as the current owner of a facility where a release occurred, was a liable party under CERCLA. The plaintiff claimed exemption from CERCLA liability based on its status as a BFPP. The defendant's argument to the contrary appears to have been based primarily on the plaintiff's delay in removing the USTs that were the suspected source of the TCE contamination.

In a brief discussion, the court found that the plaintiff was entitled to protection as a BFPP. The court noted that the California Department of Toxic Substances Control had already determined that the plaintiff was a "bona fide purchaser" under California law, which according to the court closely parallels CERCLA's BFPP provisions. The court also noted that while the

referenced USTs were not removed for a period of two years, the plaintiff had promptly emptied them following its discovery that they might be a source of the discovered contamination.

Evaluation and Takeaways. On the surface, the principal distinction between *Ashley II* and *East Imperial* lies in the willingness of the respective courts to rule on the basis of what is merely possible, as opposed to what has been demonstrated, and in the application of the burdens of proof confronting the would-be BFPP. In *East Imperial*, for example, the defendant made the facially plausible argument that USTs left in the ground, even if emptied of TCE, could nevertheless provide a conduit for surface water infiltration and resulting exacerbation of the pre-existing contamination. The court declined the opportunity to require the plaintiff to eliminate this as a possible course of events. By contrast, the *Ashley II* court construed the burden of proof very strictly: the party seeking BFPP status must prove by a preponderance of the evidence that it meets each and every element set forth in the statute—including the absence of anything that can be argued to constitute "disposal" following the date of purchase. Under the same facts, the *Ashley II* court might well have held for the defendant in *East Imperial*.

These initial judicial interpretations of the BFPP defense will no doubt be reviewed, analyzed, and hopefully clarified in future decisions. In the meantime, the practical takeaways include the following:

- Guard against "overselling" the BFPP defense. It requires much more than AAI alone. As demonstrated by both of the cases reviewed above, the BFPP "continuing obligations" are very real.

- The court pointed to consultant recommendations contained in written reports as evidence of "appropriate care" that Ashley should have taken. It is generally prudent to pare recommendations of this nature out of any document not protected by the attorney-client privilege (which needs to involve more than a "privileged and confidential" rubber stamp).

- The optimistic view of *Ashley II*'s impact on indemnity arrangements is that the court was driven more by Ashley's specific conduct (reportedly contacting EPA) as distinct from a broader animus toward indemnity arrangements. As noted, indemnity arrangements are often the best means available to bring closure to transactions involving impacted properties. Nevertheless, when advising clients with respect to environmental indemnities, practitioners should keep Ashley's expensive lesson in mind.

- The *Ashley II* court's determination that post-purchase leaching or migration constitutes "disposal" that vitiates BFPP status is troubling, and not consistent with the purposes of the Brownfield Amendments to CERCLA. It also presents a burden of proof that would often be impossible to meet.

Endnote

[1] The court's opinion and order cited no case law or other authority for this proposition. It may have been based on theories of "passive disposal" that certain courts have applied in order to assess CERCLA liability against owners or operators who did not cause or exacerbate contamination, but owned or operated property while releases were ongoing. *See, e.g., Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 845–46 (4th Cir. 1992), *cert. denied sub nom., Mumaw v. Nurad, Inc.*, 506 U.S. 940, 113 S. Ct. 377, 121 L. Ed. 2d 288 (1992) (former property owner liable because mineral spirits were leaking from underground storage tanks during its ownership of the property).

LUST FOR ENERGY: WILL LEAKING UNDERGROUND STORAGE TANK PETROLEUM BROWNFIELDS MAKE ATTRACTIVE SITES FOR RENEWABLE ENERGY FACILITIES?

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Many of the more than 200,000 petroleum-containing leaking underground storage tanks (LUSTs) have leaked at abandoned gas stations, which are typically small and widely dispersed properties. Will abandoned gas stations make attractive sites for renewable energy facilities?

Acknowledging that renewable energy science and policy are in flux, this author concludes that (1) most LUST petroleum brownfields would be more appropriate as *distribution* centers for non-fossil fuel renewable alternatives such as ethanol, biodiesel, and other motor vehicle fuels created from biomass than as renewable energy *generation* centers for large-scale wind or solar installations or biomass production; (2) redevelopment for renewable fuel distribution faces competition from a variety of established, non-energy redevelopment uses, and finally; (3) the sites' value as fuel distribution centers will depend both on demand for renewable transportation fuels and whether existing gas stations will themselves meet renewable fuel distribution needs.

Renewables Suitable to Abandoned Gas Stations?

Petroleum has been federally recognized as a brownfield contaminant since 2002, with enactment of the Small Business Liability Relief and Brownfields Revitalization Act. Potentially petroleum-contaminated sites for the first time fell under the U.S. Environmental Protection Agency's (EPA) brownfields program, and since then EPA has awarded $23 million a year, on average, to assess and clean up petroleum brownfields. States and cities may also offer technical or financial assistance to clean up petroleum brownfields.

EPA and the U.S. Department of Energy's (DOE) National Renewable Energy Laboratory (NREL), through the September 2008 initiative "RE-Powering America's Land," had by December 2009 tracked 11,384 abandoned mines and other potentially contaminated sites with renewable energy potential. As the market for renewable energy has developed, it has become clear that abandoned gas stations are typically too small for substantial renewable energy generation. Ideal parcel size for concentrating solar power is at least 40 acres, and five times that to grow biomass for biofuels. NREL, *Renewable Energy Potential for Brownfield Redevelopment Strategies* (2006), *available at* http://www.nrel.gov/docs/fy07osti/40844.pdf.

There is, however, a possible renewable energy niche for abandoned gas stations. The regulatory environment has increased demand for renewable fuels. Alternative fuels are fuels other than those made from petroleum, including alcohols, liquefied natural gas, biodiesel, ethanol-based fuels, liquids made from coal, and electricity for electric-powered vehicles. Renewable fuels are a subset of alternative fuels that can be regenerated and thus sustained indefinitely. Abandoned gas stations would appear to be obvious sites for renewable fuel distribution because their locations were originally chosen to be near intersections and other areas of high traffic. In its October 2009 pamphlet entitled *Petroleum Brownfields: Selecting a Reuse Option*, EPA listed dozens of redevelopment success stories. Among them was a single renewable fueling station on a 0.6-acre abandoned gas station. Constructed in 2006, it was "the first station of its kind in the country" selling biofuels including ethanol and biodiesel blends.

Demand for Renewable Fuel Distribution

For a variety of reasons economic and political, the search for renewable fuels is accelerating. The federal Energy Independence and Security Act of 2007 mandated 36 billion gallons of renewable fuel be used for transportation by 2022—a 500 percent increase over the figure Congress mandated just two years earlier. By comparison, year 2008 total production was only 9 billion gallons.

With legislatively increased demand for renewable fuel should come increased demand for renewable fuel distribution centers, and many petroleum brownfields "have a useful infrastructure already in place, including access to markets for labor, materials . . . existing roads, water, sewer, and electric power; and the presence of existing structures." MARK S. DENNISON, BROWNFIELDS REDEVELOPMENT 141 (1998). Additionally, they may already be properly zoned for commercial development.

Obstacles to Use of Abandoned Gas Stations

Obstacles to widespread use of abandoned gas stations for renewable fuel distribution include competition from other redevelopment uses, competition from currently operating gas stations, and regulatory uncertainty.

Multiple uses other than renewable fuel distribution appear more common and time-tested. Communities have historically redeveloped abandoned gas station sites for use as small businesses, office buildings, public buildings, parks and other green spaces, and parking lots. Government incentives to redevelop the properties for renewable fuel distribution might affect this traditional calculus.

Another question is whether currently operating gas stations will convert existing pumps or add new ones for renewable fuel use, thereby significantly diminishing the need for redeveloping abandoned gas stations for the same purpose. LUST brownfield remediation can take years, which may be too slow to compete on a wide scale with modifications to current gas stations. Consumers can already access DOE's alternative fueling station locator to "find the five closest biodiesel, electricity, E85 (ethanol), hydrogen, natural gas, and propane fueling sites." NREL News Release NR-0409, Mobile Alternative Fueling Station Locator Now Available (2009). The National Clean Cities director has suggested the problem is lack of knowledge rather than lack of distribution centers. "Most drivers don't realize alternative fuels are readily available in their areas." *Id.* (To search for alternative fuel stations, including renewables, *see* http://www.afdc.energy.gov/afdc/locator/stations/.)

Finally, policy considerations may one day cause the regulatory mandates for renewable fuels to be repealed, or at least scaled back. "Renewable" does not mean without cost. Both ethanol and biodiesel emit fossil fuel pollutants minus the CO_2, and their production may even cause a net increase in release of CO_2 when the lost American food crop is replaced by crops grown on newly cleared rainforest parcels outside the United States. Renewable fuel production itself requires energy and can cause soil and water pollution. Moreover, use of food crop in renewable fuels can lead to higher food prices. Indeed, the Agriculture Department in early April 2011 reported that U.S. corn reserves are expected to fall to a 15-year low in late August, mostly due to increasing demand from ethanol makers, who consume approximately 40 percent of the corn crop. Corn prices affect many supermarket products because corn is the main ingredient in cereals and soft drinks, and is used to feed cattle, hogs, and chickens.

Conclusion

Large-scale renewable generation will probably not be a rational use for the majority of abandoned gas stations. Even though significant renewable production on LUST petroleum brownfields seems unlikely, renewable energy distribution in the form of renewable fueling stations at abandoned gas stations may work well for the same reasons that those sites were appropriate for gas stations in the first place, such as location near passing vehicles. Challenges remain, such as the redevelopment uses communities may choose ahead of fueling stations, the possibility that investments by current gas station owners will satisfy demand without the need for many new stations, and an uncertain regulatory future that might eventually scale back what for now is mandated, increasing demand.

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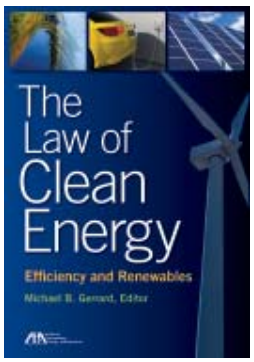

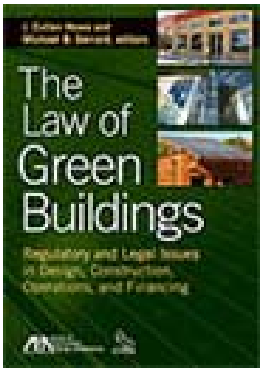

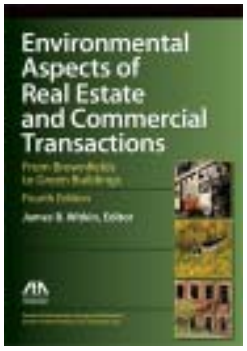

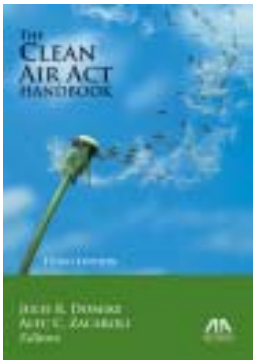

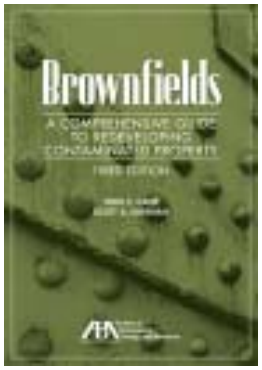

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