

**As An “Innocent” Landowner Or Prospective Purchaser,
How Do I Minimize My Liability If The Land Is Contaminated?**

When the federal “Superfund” law (also known as “CERCLA”—the “Comprehensive Environmental Response, Cleanup and Liability Act”) was passed in 1980, it included a “third party” defense to liability. But, it was nearly impossible to qualify for this defense because one of the four elements necessary was that the defendant had no direct or indirect contractual relationship with the third party. Someone entering into a purchase or lease agreement could be considered to be in a “contractual relationship.” (The law later exempted contractual relationships involving a transfer of title from this requirement.)

In 1986, the law was amended to create the “innocent purchaser” defense. It provided that a purchaser (P) who “did not know or had no reason to know” of the contamination would not have “Superfund” liability as an owner or operator. It was P’s burden to demonstrate that it made “all appropriate inquiries [AAI]... into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices ...” But, there was a “Catch-22.” If a prospective P checked for contamination and found it, P could not claim to have no knowledge of the contamination. (The same was true if P knowingly purchased a modestly contaminated “brownfield” site with the intention of voluntarily cleaning it up and redeveloping it.) But, if P checked and did not find contamination, and contamination was later discovered, this would likely be taken as an indication that the investigations done were insufficient and the “inquiries” made were not “appropriate.”

In the late 1980s and early 1990s, a diverse group of stakeholders (landowners, developers, lenders, consultants, lawyers, and environmentalists), under the auspices of ASTM (originally, the American Society for Testing and Materials), convened to develop a set of consensus standards to define “generally accepted good commercial standards and practices” which would satisfy the AAI requirement and avoid this Catch-22. This culminated in the 1993 publication of “ASTM E1527”—“Standard Practice for Environmental Site Assessments: Phase I Environmental site Assessment Process.” (The author was a member of the Drafting Task Group for this first “Phase I” standard.) This standard has since been repeatedly updated.

In 2002, the existing innocent purchaser defense was amended and a new “bona fide prospective purchaser” (BFPP) defense was added. (Other changes were also made that will not be discussed here.) The key relevant changes can be summarized as follows:

- ◆ The U.S. Environmental Protection Agency (EPA) was to develop regulations establishing standards and practices for conducting AAI in accordance with enumerated statutory criteria and generally accepted good commercial and customary standards and practices
 - During subsequent development of the EPA AAI rule, ASTM worked with EPA to revise the E1527 standard to satisfy this requirement.
 - When EPA issued the new AAI rule, it announced that the updated ASTM standard, E1527-05, was consistent and would be considered in compliance with the final rule. 70 Fed.Reg. 66,081.
- ◆ The new BFPP defense allowed a purchaser or tenant to knowingly acquire an interest in contaminated land after Jan. 11, 2002 without incurring liability for remediation if the acquirer could demonstrate that nine requirements were satisfied

- Three of these requirements can be addressed prior to consummating the transaction, but the other six relate to the period after the prospective purchaser or lessee is already in possession (this can be problematic when one wants to know the risks of liability before becoming involved with a property)
- The three pre-acquisition requirements are:
 - * all hazardous substance disposal occurred prior to P's acquisition
 - * P conducted an inquiry in accordance with the AAI Rule
 - * P established that it is not a "potentially responsible party" (PRP) or affiliated with a PRP—including through any contractual or corporate relationship (other than a purchase and sale contract)
- The six post-acquisition requirements are:
 - * P complies with all release reporting requirements (this, arguably, could also come into play before the purchase is consummated—more on this later)
 - * P takes "appropriate care" to stop any continuing release, prevent any threatened future release, and prevent or limit human or environmental exposure to any previously released hazardous substance
 - * P cooperates, assists, and provides access to authorized responders
 - * P complies with any land use restrictions and institutional controls
 - * P provides access to authorized responders
 - * P complies with any EPA request for information

A purchaser who wants to assert one of the landowner liability protections must complete its environmental site assessments within one year of taking title to the property. 40 C.F.R. §312.20(a).

Difficulties can arise where P seeks to buy a property with a history of industrial use from Seller, S, and desires to protect itself from potential Superfund liability by adhering as completely as possible to all available defenses to liability. For one thing, P would like to assess its liability exposure *before* rather than *after* it acquires title to the property. From this standpoint, it is not helpful that six of the nine BFPP requirements focus on P's post-acquisition conduct.

Hazardous substance and petroleum reporting obligations vary under different federal and state laws. For example, under Section 103(a) of Superfund, a person in charge of a "facility" need report (to the National Response Center) only a hazardous substance release that exceeds EPA-specified "reportable quantities" (RQ). The focus of this requirement is on new rather than historical releases and on releases known to exceed the RQ threshold. Moreover, this reporting obligation is on the person in charge, not a prospective purchaser.

If polluting events occurred in 1987 when a refinery owned and operated the site, but the site was later (from 1993 to 2011) owned by a manufacturing business, which did not add contamination, is the ongoing passive seepage of contamination from 1987, a "release" which P must report either before or after its acquisition of the property?

The courts are split on what constitutes a liability-creating "release." In the federal court system, the Second Circuit Court of Appeals (which includes New York) held in the *ABB Industrial Systems* case in 1997 and again in the *Niagara Mohawk* case in 2003 that the term "disposal" as used for

imposing liability under Superfund on owners at the time of “disposal” is “limited to spilling, discharging, leaking, etc., and not to passive migration.” Merely controlling a site “on which hazardous chemicals have spread without that person’s fault” does not make that person a polluter or “one upon whom CERCLA aims to impose liability.” The Third, Sixth and Ninth Circuits take a similar view. The Fourth Circuit, as indicated in the *Nurad* case (1992), does not.

A significant practical problem, even in the Second Circuit, is where P gets overzealous in reporting as “releases,” hazardous substances found or suspected on the property during pre-acquisition due diligence—without knowing the circumstances of any disposal event. While P is free to walk away from the deal, S is left to contend with the consequences: i.e., regulatory inquiries, potential enforcement action and cleanup liability, and an unsold and unsellable property.

EPA’s AAI Rule potentially addresses this situation. The Rule states that P need not conduct *pre-acquisition sampling* to comply with the AAI requirement, but only has to identify if there were any known or suspected releases. Then, P would still be deemed to have performed an AAI even if it did not disclose or remediate the release. P would not be obliged to conduct its own sampling or testing unless and until it acquired title to the property, in accordance with its post-closing continuing obligations. (Sampling might still be considered necessary in some cases; for example, to plug data gaps, or where contamination was obvious and readily detectable.)

There could still be issues under state law, as indicated in the *Emerson Enterprises* case in 2011 (WDNY). The court found, while rejecting Superfund claims, that the former owner of a company that leased contaminated property was potentially liable under New York’s Navigation Law (§181(5)) for having “caused or contributed to the *discharge*” (defined as “any intentional or unintentional action or omission resulting in the releasing, spilling, leaking, pumping, pouring, emitting, emptying or dumping of petroleum into the waters of the state or onto lands from which it might flow or drain into said waters”) by “failing to report past suspected dumping, or by failing to take some kind of remedial action to prevent the spread of contamination.” This despite the fact that there was no evidence that disposal was occurring at any time during the defendant’s ownership of the property.

It is necessary to mention two recent cases to round out this discussion of the BFPP defense.

Ashley II was decided in 2010 in the federal district of South Carolina (part of the Fourth Circuit). P, prior to purchasing industrial land that was extensively contaminated by former phosphate fertilizer plants, conducted a Phase I ESA. In addition, P contacted EPA to determine whether EPA needed any “specific cooperation, assistance, access or the undertaking of any reasonable steps” on the site. When EPA responded with an information request, P promptly responded and collected more than 450 soil samples to characterize known environmental conditions on the site. Shortly after taking title, P retained a consultant to demolish the remaining structures on a portion of the site, but did not remove underground cement pads, sumps, trenches, or underground pipes (despite Phase I recommendations to clean out the sumps and floor drains). The court held that P had failed to satisfy three of the elements of the BFPP defense: (1) all disposals did not occur before P took title, because P did not test the underground structures to determine if the underlying soil was contaminated, allowed the sumps to remain in place and fill with rainwater, and did not prove that no “disposals” had subsequently occurred (note that the court found that “disposals” had likely occurred, while agreeing that no reportable “releases” had occurred after P’s acquisition of title); (2) P failed to take “appropriate care” to stop continuing releases or prevent future releases because it failed to maintain the crushed rock cap on the site, had not cleaned out and filled the sumps when it demolished the above-ground structures but had left them exposed to the elements, and had failed to remove a debris pile for over a year; and (3) P was “affiliated” with a PRP because it indemnified the prior owners and sought to dissuade EPA from recovering response costs from them.

In the 3000 E. *Imperial case* (C.D.Cal. 2010), P acquired a property previously used to manufacture aircraft, missile valves, and furniture. Pre-acquisition due diligence established that the site had been contaminated, and identified as one “area of concern” former underground storage tanks (USTs) that contained chlorinated solvents. Within 6 months after acquiring title, P drained the USTs, but waited two additional years to excavate them. Because there was no evidence that this additional delay allowed rainwater to accumulate or result in environmental releases, the court found that P had satisfied BFPP by taking reasonable steps to prevent further releases. (P was also held to have satisfied state BFPP requirements because it was working under the supervision of the Department of Toxic Substances.)

Conclusions:

- ◆ Pre-acquisition environmental due diligence need generally not include intrusive environmental sampling and testing; AAI requirements can usually be satisfied with ASTM-compliant Phase I environmental site assessments
- ◆ However, Phase I assessments should consider whether there are conditions on the property that could result in an ongoing release (e.g., from an underground structure), giving rise to post-closing ongoing compliance requirements
- ◆ Phase I environmental site assessments should not include specific recommendations for Phase II or remedial actions—because the failure to fully or promptly implement these recommendations could be viewed as a failure of post-closing appropriate care (recommendations can be separately communicated by the environmental consultant outside of the Phase I and the AAI Rule); if the Phase I contains recommendations, it can be perilous not to follow them
- ◆ Purchasers should be especially sensitive to contamination in surface soils and to not spreading it around in the course of site grading or other earth-moving activities, lest this be deemed a new disposal or release event
- ◆ Purchasers of contaminated land should avoid indemnifying prior owners because this could be viewed as evidence of a BFPP-disqualifying contractual affiliation with a PRP
- ◆ Purchasers may wish to obtain a “reasonable steps” letter from EPA to circumscribe their potential assessment and cleanup costs and to improve their ability to recoup these costs from PRPs; however, at the pre-acquisition stage, there may be too little information to obtain appropriately focused guidance from the agency
- ◆ Similar guidance may also be sought from the state environmental agency; however, in New York State (and elsewhere?), the agency may not be willing to get involved in such oversight if the requester has not formally subjected itself to one of the agency’s “Part 375” cleanup programs
- ◆ Sellers of potentially contaminated land, while meeting their legal and ethical disclosure obligations, should be wary of allowing prospective purchasers to engage in intrusive environmental sampling and testing before the sale has closed, even if the Seller did not cause or contribute to contamination during its period of ownership, because reporting (appropriately or not) of the results to federal or state regulators, could result in response cost liability by the Seller, whether or not the deal goes forward.

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