EPA Issues Guidance On New CERCLA Landowner Defenses

Last December, Congress amended the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) to modify the innocent landowner defense and to add liability exemptions for "bona fide prospective purchasers" (BFPPs) and owners of property onto which contamination migrated from a contiguous contaminated property. See, "Superfund Amendments Encourage Brownfield Development," 13 Michigan Environmental Compliance Update (May 2002). The purpose was to encourage developers and lenders to redevelop contaminated properties. Unfortunately, these amendments did not clearly define what a landowner must do to qualify for the exemptions.

In response to requests by many developers, the United States Environmental Protection Agency (EPA) recently issued a guidance stating how EPA intends to interpret and apply these new provisions. *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")* (March 6, 2003) (the Guidance). Although the Guidance is not binding, it may help landowners decide how far they should go in monitoring or possibly remediating contamination, and may help developers decide whether or not to proceed with a potential project.

A. Threshold Criteria

To qualify for any of the three landowner defenses, a person must satisfy two threshold criteria. First, the landowner must have made "all appropriate inquiry" into the previous ownership and uses of the property before acquiring it. For property purchased on or after May 31, 1997, this requirement can be satisfied by performing a Phase I Environmental Site Assessment as described in ASTM Standard E1527-97. Early this year, EPA promulgated, and

then withdrew, a rule allowing the use of ASTM Standard E1527-2000 as an alternative. EPA is now establishing an advisory committee to develop a new rule to define "all appropriate inquiry."

Second, to qualify for the BFPP or contiguous property owner defense, the owner must not be "affiliated with" anyone who is potentially liable for response costs at the property by a "direct or indirect familial relationship or any contractual, corporate and financial relationship" other than a contract for sale of goods or services. The "affiliation" test for the innocent landowner defense is defined separately. The Guidance does little to clarify the "affiliation" test for any of the defenses. The Guidance does not state whether EPA will limit "familial relationships" to a person's immediate family, or whether it will include cousins or in-laws. Nor does it explain what kinds of contract, corporate, or financial relationships EPA will consider sufficient to render a landowner "affiliated with" a liable party. The Guidance simply states that EPA "intends to be guided by Congress' intent of preventing transactions structured to avoid liability."

B. Continuing Obligations to Protect Environment

1. Land Use Restrictions and Institutional Controls

To qualify for any of the three landowner defenses, an owner must, among other things: (1) comply with any land use restrictions (LURs) relied on in connection with a response action, and (2) not impede the effectiveness of any institutional control (IC) employed in connection with a response action. The Guidance takes the position that an owner must comply not only with LURs and ICs that were in effect when he or she acquired the property, but must also comply with any that are imposed thereafter. In some cases, requiring non-liable landowners to comply with LURs or ICs that they did not anticipate may seriously reduce the value of their

properties, and may make developers unwilling to acquire properties for which a final cleanup plan has not been selected.

The Guidance says that landowners must comply with all LURs that were "relied on" when EPA or the state selected a response action, even if the restriction was not implemented through an enforceable IC. To determine what LURs were "relied on," the Guidance says that a landowner may need to consult: the EPA or state risk assessment, remedy decision document, and remedy design document; a permit, order and consent decree; statutes; and "other documents developed in conjunction with a response action." This list demonstrates that it may be difficult for an owner to determine what LURs, if any, EPA or a state "relied on" for a response action, and with what restrictions the landowner must comply. If an owner fails to comply, the Guidance states that he or she will "forfeit the liability protection," and that EPA may either order the landowner to remedy the violation or may sue to recover EPA's costs of remedying the violation.

An owner may also forfeit this liability protection if the owner "impedes the effectiveness of" an IC. According to the Guidance, that may occur if an owner removes a notice of an IC from the public land records, fails to notify a new purchaser of the IC, applies for a zoning change or variance that conflicts with the IC, or refuses to record a notice in the land records that was required by EPA or a state. The Guidance recognizes that if environmental conditions at the property change, an owner may seek changes in LURs or ICs with the approval of EPA or the state environmental agency.

2. Reasonable Steps To Investigate Or Remediate Contamination

To qualify for any of the three landowner defenses, an owner must: (1) stop any continuing releases; (2) prevent any threatened future releases; and (3) prevent or limit exposure

of humans and the environment to releases of hazardous substances. According to the Guidance, these requirements are "consonant with traditional common law principles and the existing CERCLA 'due care' requirement." This suggests that EPA will consider both common law cases and CERCLA "due care" cases in evaluating what a non-liable owner must do to qualify for one of the three landowner defenses.

The Guidance states that "as a general matter" the response obligations of a non-liable owner will be less than the obligations of a liable party. However, it also states that the obligations of a non-liable owner would be "akin to" the obligations of a liable party in some "unusual circumstances," including when: (1) the only uncompleted response action is compliance with ICs or environmental monitoring; (2) the response action will primarily benefit the landowner; or (3) the owner is the only person in a position to prevent an immediate hazard. The Guidance also notes that the obligation of a BFPP to take "reasonable steps" may be broader than the obligations of an innocent landowner or a contiguous landowner, because a BFPP will usually know about the contamination before deciding to buy the property. The Guidance states that EPA will consider a BFPP's knowledge of contamination and his opportunity to plan for it before buying the property, as factors in deciding what "reasonable steps" the BFPP must take to investigate and possibly remediate contamination.

The Guidance states that EPA will consider CERCLA cases that discuss what steps innocent landowners must take to satisfy their "due care" obligations under the innocent landowner defense as a "reference point" in evaluating what a landowner must do to satisfy the "reasonable steps" requirements under any of the three landowner defense.

An attachment to the Guidance lists the following as potential "reasonable steps" that a non-liable landowner may be required to take to avoid becoming a liable party: (1) notify EPA

or the state if hazardous substances are discovered; (2) restrict access to the site; (3) segregate and overpack leaking drums; (4) repair breaches in a containment system or a landfill cap; (5) maintain containment systems in working order; and (6) investigate the extent of contamination. However, “reasonable steps” generally do not include full scale remediation of groundwater contamination.

The Guidance does not discuss what a landowner may have to do to satisfy his obligations under environmental statutes other than CERCLA. Such statutes may impose obligations that are more extensive than those required to maintain eligibility for the three landowner defenses under CERCLA.

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