

EPA May Negotiate Fewer Prospective Purchaser Agreements

A recent United States Environmental Protection Agency (EPA) guidance memorandum suggests that EPA may be less willing in the future to enter into agreements that protect prospective purchasers of contaminated property from liability for existing contamination. This development may be a step backward in EPA's efforts to encourage redevelopment of Superfund sites and brownfields.

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and other environmental laws that impose strict liability on landowners to remediate contamination, have been criticized because they discourage potential developers from acquiring, remediating, and reusing contaminated properties. In response to this criticism, EPA issued guidance documents in 1989 and 1995 that encourage EPA regions to negotiate agreements with prospective purchasers (Prospective Purchaser Agreements or PPAs), in which EPA agrees not to hold the purchaser liable for contamination that predated the purchase, and the purchaser agrees to perform limited remediation, reimburse a portion of EPA's cleanup costs, and/or redevelop the property in a way that benefits the public.

Last December, Congress enacted amendments to CERCLA that, among other things, created a "bona fide prospective purchaser" (BFPP) defense. The BFPP defense provides that a BFPP who becomes owner of a property after January 11, 2002, is not liable under CERCLA for preexisting contamination, provided that he can prove that he did not dispose of any hazardous substance, that he made all appropriate inquiry into the previous uses of the property, that he exercised "appropriate care" with respect to hazardous substances, and several other requirements.

EPA regional offices continued to enter into PPAs even after the amendments. Between December 20, 2001 and July 10, 2002, EPA regions gave public notice in the *Federal Register* of fifteen proposed PPAs. Nonetheless, some government attorneys questioned whether EPA should continue negotiating PPAs, or should simply tell prospective purchasers to rely on the BFPP defense.

On May 31, 2002, EPA Headquarters issued an internal guidance memorandum regarding the new BFPP defense and PPAs. The guidance memorandum states that it supplements, but does not replace, EPA's previous guidance documents concerning PPAs. It states that "in most cases" the BFPP defense makes PPAs "unnecessary." It goes on to say that EPA will consider entering into PPAs in the future in three "limited circumstances:"

- When significant environmental benefits (cleanup, reimbursement of EPA costs, or new property use) will result from the PPA and "there is a significant need for a PPA" to complete the project;
- When the property is currently involved in CERCLA litigation and there is "a very real possibility" that anyone who buys the property would be sued by someone other than EPA;
- When there are "unique site-specific circumstances" in which a "significant public interest would be served by the transaction and it would not otherwise occur without issuance of a PPA."

The memorandum leaves substantial wiggle room for an EPA region to enter into a PPA if it is inclined to do so, although the overall tone of the memorandum discourages

EPA regions from devoting their resources to PPAs. The effect of the memorandum will probably be to reduce the number of PPAs substantially. Only five PPAs have been announced in the *Federal Register* after EPA's May 31, 2002 guidance, and only one was submitted to the *Federal Register* office after May 31, 2002. A developer that wishes to redevelop contaminated property, or a municipality that wants to encourage such a redeveloper, may now not be able to obtain a PPA from EPA without bringing substantial political pressure to bear on EPA, or persuading EPA that the development will result in a substantial benefit to the public in terms of an environmental cleanup, reimbursement of EPA response costs, or productive reuse of contaminated property.

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