Avoiding Liability for Property Contamination Through "All Appropriate Inquiry"

By Steve Jones

One of the primary factors affecting the purchase or financing of real property is the environmental condition of the property. This is because CERCLA – the federal Superfund statute – does not limit liability for cleanup costs solely to parties causing the pollution. Instead, CERCLA imposes "joint and several liability" on both owners and operators of contaminated property, regardless of fault.[1] The potential for joint and several liability can deter development of contaminated or potentially contaminated property, commonly called "brownfields."[2]

CONGRESS' EFFORTS TO PROMOTE USE AND DEVELOPMENT OF BROWNFIELDS

Congress' first attempt to protect innocent landowners of contaminated property came through adoption of the Superfund Amendments and Reauthorization Act ("SARA"), which protected those acquiring contaminated property through inheritance or bequest. However, SARA contained no protections for purchasers who learned about contamination through pre-purchase due diligence.

In 2002, Congress adopted the Business Liability Relief and Brownfields Revitalization Act (the "Brownfields amendments"). The Brownfields amendments modified CERCLA by adding an innocent landowner defense, contiguous property owner protections and liability protections for "bona fide prospective purchasers" ("BFPPs") of contaminated property. Parties acquiring contaminated property after January 2002 could obtain BFPP protection by showing that:

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[1] *See* CERCLA section 107(a); 42 U.S.C. § 9607(a). "Joint and several liability" means that a party is responsible for 100% of the costs of any cleanup, though CERCLA does contain provisions allowing for recovery or allocation of such costs between responsible parties.

[2] CERCLA defines a "brownfield site" as any "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." 42 U.S.C. § 9601(39)(A).

- Disposal of any hazardous substances occurred prior to acquisition;
- The purchaser had no affiliation with the party responsible for the contamination;
- The purchaser undertook "all appropriate inquiry" ("AAI"), a term of art defined by EPA regulations; and
- The purchaser agreed to comply with continuing obligations affecting the property, commonly known as "institutional controls."[3]

Protection as a BFPP is automatic – there is no government program a purchaser needs to enroll in to qualify, so long as they can provide evidence showing that they satisfy the elements of the defense.

The 2018 Omnibus Spending Bill included the Brownfields Utilization, Investment and Local Development Act ("B.U.I.L.D."), which was designed to encourage public and private development of contaminated property, with a special emphasis on renewable and energy-efficient projects and waterfront brownfields property. The B.U.I.L.D. Act exempts most acquisitions of contaminated property by local governments, contains protections for lessees, and provides federal grants and other funding for certain brownfields projects.

OBTAINING LIABILITY PROTECTION FOR PROPERTY CONTAMINATION

To qualify as a BFPP, at a minimum, a purchaser must investigate historical uses of the property as part of its AAI. This is done through a Phase I investigation complying with ASTM standards.[4] Phase I investigations must be conducted by a qualified "environmental professional" and focus on identifying "recognized environmental conditions" on the property. This is done by investigating historical uses of the property, review of aerial photographs, examining state and local environmental agency records and determining whether the property has ever been included on lists of known contaminated sites.

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[3] Examples of institutional controls would be deed restrictions prohibiting use of on-site groundwater as drinking water supplies or development limits designed to prevent exposure to contaminated soil, the classic example being prohibiting residential or school use that might expose children to contaminated dirt.

[4] ASTM stands for the "American Society of Testing and Materials," which develops and publishes voluntary consensus technical standards. Any Phase I property assessment must comply with ASTM E1527-13.

In the event the Phase I investigation identifies recognized environmental conditions necessitating additional investigation, a Phase II investigation is required. The difference between a Phase I and Phase II assessment is the scope of the investigation – a Phase I establishes the likelihood of contamination while a Phase II determines whether contamination is actually present through invasive sampling of the soil and water, laboratory analysis of samples, and inspection of interior spaces for mold, radon, lead paint, and asbestos.

ADDITIONAL DUE DILIGENCE CONSIDERATIONS

In addition to qualifying for BFPP protections, parties considering acquiring real property adjacent to or hydrologically connected with navigable waters – basically any river, lake or non-intermittent stream – should consider an assessment to determine if development will impact wetlands, which would require a permit from the Corps of Engineers. Finally, the U.S. Supreme Court's decision in the case of *County of Maui v. Hawai'i Wildlife Fund* held that discharges to groundwater may require a Clean Water Act permit.

If you need help in conducting appropriate environmental due diligence or in identifying and obtaining necessary permits prior to development, please contact Steve Jones, Blaine Rawson, or any member of our Real Estate Transactions or Environmental and Natural Resources practice groups.

Steve Jones handles environmental matters in both the litigation and transactional arenas. He has litigated cases under every major environmental statute, including CERCLA, RCRA, the Clean Water Act and Clean Air Act, in both citizen suits and environmental enforcement actions brought by state and federal agencies.