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Elusive Nature of Defenses to CERCLA Liability: Beyond Conducting “All Appropriate Inquiry”

Conducting environmental due diligence as part of a real property transfer, or an asset or stock purchase, makes good business sense. One should know what problems may be lurking and be prepared to address them. Many people also insist on conducting due diligence to obtain the benefits of the so-called innocent purchaser defense to liability under CERCLA. In this one-minute memo, we update the reader on the status of the proposed regulatory change to the CERCLA standard for conducting “all appropriate inquiry,” and we discuss the steps that one must take to *maintain* the CERCLA defense.

Who is Exempted from Liability under the CERCLA?

- **Innocent Landowner (ILO):** a purchaser of property who bought without knowing, or having reason to know, of hazardous substance releases.
- **Bona Fide Prospective Purchaser (BFPP):** The 2002 Amendments to CERCLA added a liability defense for a buyer who purchases property knowing, or having had reason to know, of a hazardous substance release.
- **Contiguous Property Owner (CPO):** The 2002 Amendments to CERCLA added a liability defense for an owner whose property was contaminated by contiguous properties and who purchased its property neither knowing nor having a reason to know of contamination on the acquired property.

Has “All Appropriate Inquiry” Changed Under the 2002 Amendments?

Yes. Congress directed EPA to promulgate a regulation establishing what constitutes “all appropriate inquiry.” However until EPA promulgates the regulation, parties may continue to rely on the method that is currently employed, which is based on ASTM E 1527-00.

The EPA and interested stakeholders have negotiated a draft rule that currently is under consideration. (A proposed rule based on the negotiated draft rule is due for publication soon in the Federal Register.) A copy can be obtained at EPA’s website.^[1] If promulgated in its current form, the new due diligence standard will differ from the ASTM standard in several significant respects. For example, ASTM seeks to identify “recognized environmental conditions,” which are defined as “the presence or likely presence of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a *material* (emphasis added) threat of a release of any hazardous substances or petroleum products into structures on the property or into the

ground, ground water, or surface water of the property.” The term is not intended to include *de minimis* conditions that generally do not present a material risk of harm to public health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.

In contrast, EPA’s contemplated standard seeks to identify “conditions indicative of releases and threatened releases of hazardous substances on, at, in or to the subject property.” The EPA standard does not require the identification of releases that “because of said quantities and amounts, generally would not pose a threat to human health or the environment.”

The EPA standard also contemplates minimum qualifications for persons conducting due diligence and generally imposes more onerous requirements for interviewing past and present owners, operators and occupants.

In preparing a due diligence report, the environmental professional, under EPA’s contemplated standard, will need to identify data gaps, describe the efforts made to resolve these gaps, and render an opinion about the effect that the data gaps have on the professional’s ability to identify conditions indicative of releases or threatened releases.

There are, of course, other differences too numerous to detail here.

What Must be Done to Maintain the CERCLA Defense?

The 2002 Amendments to CERCLA require persons who are capable of obtaining the defense to take affirmative steps to maintain the defense. These steps include:

- Compliance with Land Use Restrictions and Institutional Controls.** BFPPs, CPOs and ILOs must be in compliance with any land use restrictions established or relied on in connection with the response action and must not impede the effectiveness or integrity of any institutional control employed in connection with a response action.
- Reasonable Steps.** BFPPs, CPOs and ILOs are required to take reasonable steps to: stop continuing releases, prevent threatened future releases, and prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.
- Cooperation, Assistance, and Access.** BFPPs, CPOs and ILOs must provide full cooperation, assistance, and access to persons authorized to conduct response actions or natural resource restoration, including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action or natural resource restoration.
- Compliance with Information Requests and Administrative Subpoenas.** BFPPs and CPOs must comply with CERCLA information requests and administrative subpoenas.
- Provision of Legally Required Notices.** BFPPs and CPOs must provide legally required notices related to the discovery or release of hazardous substances at the facility. “Legally required notices” may include those required under federal, state, and local laws. Examples of federal notice requirements include: CERCLA § 103 (notification requirements regarding released substances); EPCRA § 304 (“emergency notification”); and RCRA § 9002 (underground storage tanks notification provisions).

What Constitutes “Reasonable Steps” to Stop On-going or Future Releases?

Congress did not define what constitutes “reasonable steps.” EPA, however, has issued guidance which can be found at EPA’s website.[2] EPA believes that “reasonable steps” means “acting responsibly where hazardous substances are present on their property” and equates this obligation with “traditional common law principles” and the existing CERCLA “due care” requirement. EPA seems to agree that “reasonable steps” is something less than what is required of a party liable under CERCLA. For example, in its guidance, it states: “In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create, as a general matter, the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil, extraction and treatment of contaminated groundwater).” However, EPA does have high expectations for those who might qualify for the defense. EPA states that the discovery of contamination would warrant prohibiting access by erecting fences or providing security. If drums are discovered, EPA would expect the landowner to identify the potential hazards, and stabilize site conditions by, for example, over packing drums that have the potential to leak, and by responding to any breach of an existing containment system. Indeed, according to EPA, “reasonable steps” could include virtually any action required of a party liable under CERCLA, except that the party generally would not be expected to have to remediate groundwater.

What Does A Property Purchaser Need to Do to Protect Itself?

Purchasers need to be aware that obtaining a Phase I and Phase II report alone will not protect the purchaser from liability. Where the property is determined to be environmentally challenged, either before or after “all appropriate inquiry” has been conducted, the property owner may need to take additional steps in order to avail itself of the defenses to liability provided in CERCLA. The steps that need to be taken will depend on the circumstances. Moreover, the steps to be taken may depend on the party’s status. For example, less might be required of a contiguous landowner who lacks control over the source of contamination. In contrast, more might be expected of a BFPP because it will know of the environmental problems prior to purchase and will have an opportunity to plan on how to stabilize the property and contain any anticipated releases.

Readers are welcome to contact any member of Seyfarth Shaw’s Environmental, Safety and Toxic Tort practice group with any questions relating to CERCLA’s defenses.

[1] <http://www.epa.gov/swerosps/bf/aai/draftreglangfinal.pdf>

[2] <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>



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