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# Taking Reasonable Steps to Preserve CERCLA Defenses After the 2002 Amendments

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## I. Landowner Liability Under CERCLA

When the Comprehensive Environmental Response, Compensation and Liability Act of 1980, which is commonly known as CERCLA or Superfund,[1] was enacted over twenty-five years ago, the statute contained few defenses. A recognition of the need for additional statutory defenses grew as CERCLA's basic liability scheme began to be articulated by the Environmental Protection Agency (EPA) and the courts as one which imposes strict, retroactive, and joint and severable liability for releases and threats of releases of hazardous substances. This recognition occurred most quickly and widely in the situation where an entity was going to acquire real property. Upon acquiring the property, the new owner could be ordered by the government to investigate contamination and to take a wide variety of other response actions with respect to releases of hazardous substances on the property. Alternatively, the new owner might be required to reimburse government agencies or in some cases private parties for their future expenditures in responding to releases on the property.

The angst over CERCLA liability experienced by commercial real estate developers and other property owners was shared by their lenders. The ability of a borrower to repay its mortgage could be threatened by CERCLA liability costs. In addition, the lender faced direct CERCLA liability if it foreclosed or if actions to protect its mortgage or a security interest were viewed as operating the facility before or after the foreclosure.[2] This liability could be larger than the value of the loan or the property.

## II. Problems Perceived with Landowner Liability

Imposing CERCLA liability on innocent landowners, including banks protecting or foreclosing on loans, seemed wrong-headed and perverse to many persons. Landowner liability did not square with the rhetoric of "making the polluter, not the taxpayer" pay for cleaning up contamination, which was the rationale used to support CERCLA's enactment. After all, acquiring title to property does not make one a "polluter." In addition, viewed against a backdrop of a general system of environmental law in which pollution control and remediation responsibilities are basically premised on causation (hence again the articulation of "polluter pays" as a legislative "principle"), it was strikingly unfair to impose CERCLA clean-up liability on a landowner or lender who did not cause the pollution.

Questions of fairness aside, landowner liability created social implications. The threat of liability for pre-existing contamination casts a large shadow over properties which may have been contaminated with hazardous substances by prior uses. Properties which exist under this shadow have become known as "Brownfields," regardless of whether they actually have been contaminated to any substantial extent by prior uses. One

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1. 42 U.S.C. §§ 9601 - 9675.

2. *See* 56 Fed. Reg. 28798 (June 24, 1991) (issues reviewed in preamble to EPA proposed lender liability rule).

result of this shadow or stigma has been reduced reuse of Brownfields and increased sprawl.

## III. Defenses to Landowner Liability

Over the last two decades, Congress has enacted a series of amendments creating defenses against clean-up ability under CERCLA. These changes to the CERCLA liability scheme have been made cautiously. The defenses are narrow. To a considerable extent these provisions reflect rules and policies which the EPA had adopted to address these issues.[3] To a large extent, the adequacy of these defenses in achieving their purposes depend on how they are implemented by buyers, lenders, and the EPA.

## IV. Secured Creditor Exemption

In 1996 Congress amended CERCLA to further define at length a provision, which was added in 1986, exempting from the statutory definition of "owner and operator" a "lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect [its] security interest."[4] Virtually all the words and phrases in this exemption are now defined by the new provisions added to the statute.[5] These provisions clarify what a secured lender may do before and after foreclosure to avoid the liability-triggering act of "participating in management." By carefully limiting activities to those listed in the statute, a secure lender may preserve this exemption.

One mandatory act to preserve this exemption occurs upon foreclosure. Thereafter, the lender must "seek to sell, re-lease (in the case of a lease finance transaction), or otherwise divest…the facility or vessel at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements."[6]

## V. Innocent Landowner Defense

The innocent landowner defense was enacted in 1986 and appears in 42 U.S.C. section 9601(35)(A)(i). This section, which is read in conjunction with the third-party defense in 42 U.S.C. section 9607(b)(3), provides a defense for liability from hazardous substances of which an innocent landowner did not know or had no reason to know before purchasing the property. This was modified by 2002 amendments, discussed *infra* at Parts VI.–IX.

To establish and preserve the innocent landowner defense, several requirements must be met. The owner must:

- acquire ownership after all disposal of hazardous substances occurred at the facility;
- make all appropriate inquiry regarding the previous ownership and use of the property before acquisition;
- take reasonable steps to stop any continuing release, prevent any threatened future release, and prevent or limit any human, environmental, or natural resource exposure to any previous release;
- fully cooperate with and assist persons conducting response actions; and
- comply with any land use restrictions and institutional controls established in connection with a response action.

To establish and preserve the innocent landowner defense, it is also necessary to demonstrate compliance with the third-party defense set forth in 42 U.S.C. section 9607(b)(3). The landowner must establish by a preponderance of the evidence that:

- the act or emission which caused the release, and the resulting damages, were caused by a third-party with whom the landowner has no employment, agency, or contractual relationship;
- the landowner exercised due care with respect to the hazardous substances concerned; and
- the landowner took precautions against the foreseeable acts or omissions of any such third party and the foreseeable consequences of such acts or omissions.

## VI. New Bona Fide Prospective Purchaser Defense

The 2002 amendments added a new "bona fide prospective purchaser" defense in 42 U.S.C. section 9607(r). In contrast to the innocent landowner defense, this new defense can apply to hazardous substances which the purchaser knew were on the property when it was purchased after January 11, 2002.

There are several elements to the bona fide prospective purchaser defense. To establish and to preserve this defense, the owner must:

- not be affiliated with any potentially liable party through a familial, financial, corporate or contractual relationship;
- acquire ownership after all disposal of hazardous substances occurred at the facility;
- make all appropriate inquiries regarding the facility before acquisition;

3. *See, e.g.*, 57 Fed. Reg. 18344 (April 29, 1992) (EPA lender liability rule).

4. 42 U.S.C. § 9601(20)(E)(i). The Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1996, 110 Stat. 3009.

5. *See* 42 U.S.C. § 9601(20)(E)-(G).

6. 42 U.S.C. § 9601(20)(E)(ii).

- provide all legally required notices regarding the hazardous substances released at the facility;

- take reasonable steps to stop any continuing releases, prevent or limit any threatened future release, and prevent or limit human, environmental, and natural resource exposure to any previous release;

- fully cooperate with and assist persons conducting response action;

- provide all legally required notices regarding the discovery or release of the hazardous substances;

- comply with any land use restrictions and institutional controls established in connection with a response action; and

- comply with any information request under CERCLA.

## VII. New Contiguous Property Owner Defense

CERCLA's broad landowner liability concept presents additional issues where the source of the contamination is on an adjacent property. The 2002 amendments provide a defense to a landowner whose property is contaminated by releases migrating from contiguous property which the landowner does not own.[7] This defense basically codified an earlier EPA policy.[8]

There are several required elements to the contiguous property owner defense. The first three are that the landowner: (1) did not cause, contribute or consent to the release; (2) is not affiliated with a potentially liable party through a familial, financial, corporate, or contractual relationship; and (3) made all appropriate inquiry regarding the facility before acquisition. The remaining four elements involve actions which must be taken after the contamination is discovered. Hence, they are particularly relevant in terms of what must be done to preserve this CERCLA defense. These elements require the owner to:

- take reasonable steps to stop continuing releases, prevent or limit future releases, and prevent or limit human, environmental and natural resource exposure to any previous releases;

- fully cooperate with and assist persons conducting response actions;

- provide all legally required notices regarding the hazardous substances, released at the facility; and

- comply with any land use restrictions and institutional controls established in connection with a response action.

## VIII. Common Elements

The 2002 amendments establish several elements for establishing each of these defenses, some of which are common to all these defenses. Two of those common elements, including the "All Appropriate Inquiry" element, relate to acts which must be taken before acquiring the property. The remainder of these common elements impose continuing obligations which must be met after hazardous substances are discovered in order to preserve these defenses. The "Reasonable Steps" requirement is an example of these obligations. The EPA's March 6, 2003 Interim "Common Elements" Guidance discusses all of these elements.

## IX. All Appropriate Inquiry

The 2002 amendments specify as an element of the innocent landowner defenses a duty to conduct all appropriate inquiry before acquiring the property. The amendments state that purchasers of property before May 31, 1997 must have taken into account such things as commonly known information about the property, the value of the property if clean, the ability of the defendant to detect contamination, and other similar criteria.[9] For property purchased on or after May 31, 1997, the procedures of the American Society for Testing and Materials (ASTM), including the document known as Standard 1527-97, entitled "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process," are to be used until the EPA promulgates regulations.[10]

The 2002 amendments require the EPA to promulgate regulations establishing standards and practices for "all appropriate inquiry," and set out criteria that must be addressed in the EPA's regulation.[11] The "all appropriate inquiry" requirement is the subject of EPA regulations.[12]

The EPA regulations contain many elements. For example, the rule defines the qualifications of the "environmental professional" who is to conduct the inquiry. The regulation expands the ten statutory criteria for "all appropriate inquiry" by requiring that certain additional inquiries be conducted. The regulation defines certain responsibilities of the purchaser in providing information to the environmental professional. Complying with the requirements of the EPA rule is crucial to preserving these defenses.

7. 42 U.S.C. § 9607(q).

8. *See* 60 Fed. Reg. 34790 (July 3, 1995).

9. 42 U.S.C. § 9601(35)(B)(iv)(1).

10. 42 U.S.C. § 9601(35)(B)(iv)(II).

11. *Id*.

12. 70 Fed. Reg. 66069 (Nov. 1, 2005).

## X. Reasonable Steps

Another common requirement for establishing the innocent landowner, the prospective purchaser, and the contiguous property owner defenses is that person take "reasonable steps" to: (1) stop any continuing release; (2) prevent any threatened future release; and (3) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance. Unlike the "all appropriate inquiry" element, CERCLA does not set forth statutory criteria and rulemaking obligations to clarify what constitutes these "reasonable steps." The vagueness of this term can be a subject of considerable consternation to a property owner who was careful to take "all appropriate action" only to have his liability defense threatened by potential after-the-fact disagreements over whether his actions constituted "reasonable steps."

Some clarification can be obtained by reviewing the EPA's March 6, 2003 Interim "Common Elements" Guidance as to the agency's interpretation of "reasonable steps," which also discusses other element's in these landowner defenses. The EPA notes that a bona fide prospective purchaser who knows of contamination might be subject to greater "reasonable steps" obligations than other protected landowners who did not have an opportunity to plan affirmative steps prior to the purchase. The EPA emphasizes that any owner generally must take some affirmative steps when confronted with hazardous substances on its property. In particular, the EPA points out that giving timely notification to government authorities of the discovery of contamination and taking basic actions to assess the extent of contamination would be reasonable steps. The EPA also states that generally, but not necessarily always, "reasonable steps" as to remediation are something less than the remedy a liable party under CERCLA would have to take. Recognizing that reasonable steps will depend on the facts of each specific case, the EPA states that upon request it may, in its discretion, provide a comfort letter addressing reasonable steps to be taken at a specific site. If so, the EPA may confer with state authorities before issuing such a letter.

The EPA notes in its "Common Elements" Guidance legislative history indicating that conducting groundwater investigations or installing ground water remediation systems will not be required in order to preserve this defense for contiguous property owners absent exceptional circumstances. As a further example, EPA states that if a leaking drum is discovered, the drum should be segregated and containted, and its contents identified.

In the preamble to the proposed "all appropriate inquiry" rule, the EPA discusses how data gaps identified during a pre-acquisition environmental assessment relate to "reasonable steps" obligations. The EPA states; "A person's inability to obtain information regarding a property's ownership or use prior to acquiring a property can affect the landowner's ability to claim a protection from CERCLA liability after acquiring, if a lack of information results in the landowner's inability to comply with any other post-acquisition statutory obligations that are necessary to assert protection from CERCLA liability."[13] As an example, the EPA states: "if a person does not identify…prior to acquiring a property, a leaking underground storage tank that exists on the property, the landowner may not have sufficient information... to take reasonable steps to stop on-going releases after acquiring the property."[14] Note that these statements indicate that, in the EPA's view, "reasonable steps" obligations start before the property is acquired.

## XI. Conclusion

Because of CERCLA's liability scheme, establishing and preserving CERCLA defenses are important considerations when property is being acquired or when contamination is encountered on owned property.

13. 69 Fed. Reg. 52542, 52560 (Aug. 26, 2004).

14. *Id.*