

CONTINUING OBLIGATIONS AND REASONABLE STEPS UNDER AAI

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Environmental attorneys and consultants have had more than six years to digest and apply the “Small Business Liability Relief and Brownfields Revitalization Act of 2002,” also known as the Brownfields Amendments. These amendments provide certain landowner liability protections (LLPs) for those purchasing environmentally impaired real estate assets, provided that purchasers meet the criteria set out in the legislation that include performing all appropriate inquiry regarding environmental conditions and continuing to behave responsibly regarding known conditions and other environmental obligations.

Much has been written about what constitutes all appropriate inquiry (AAI), and some aspects of continuing obligations (e.g., identifying and complying with institutional controls) have also been the subject of many articles. This article discusses another key continuing obligation—the obligation to 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 previously released hazardous substance.” The quoted language is taken from the innocent landowner LLP (or “ILO,” Section 223 of the Brownfields Amendments), but the same or similar language appears in the LLPs for releases from contiguous properties (“CPOs,” Section 221) and for bona fide prospective purchasers (“BFPPs,” Section 222).

Completing an AAI Environmental Site Assessment (ESA) is only the first step in establishing an LLP defense. The AAI Rule’s preamble emphasizes that once a property is acquired, the owner must comply with all of the statutory criteria necessary to qualify for the relevant LLPs. The mere fact that a buyer conducted AAI does not provide a defense to Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) liability.

The preamble clarifies the concepts “Additional Appropriate Investigation,” “Data Gaps,” and “Continuing Obligations” (i.e., conditions that must be met in addition to AAI in order to qualify for the LLPs). Additionally, the “user” may have *continuing obligations*, which might include taking *reasonable steps* to comply in order to maintain the LLP over time (i.e., through the term of ownership).

What are continuing obligations generally?

Comply with land use restrictions and institutional controls. Examples might be a zoning restriction on land use, or an easement or restriction so no new development occurs in certain contaminated areas of the site. The user must honor and comply with these restrictions.

Take reasonable steps with respect to hazardous substance releases. This might involve stopping a known release; preventing exposure to humans and the environment; preventing threatened future releases; and providing full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration (e.g., those investigating, sampling, installing monitoring wells, etc.). According to EPA, “reasonable steps” does not necessarily mean remediation.

Comply with information requests and administrative subpoenas. This obligation involves responding to requests for information and subpoenas issued under statutory authorities including CERCLA.

Provide legally required notices. These notices would include, for example, reporting hazardous substance releases, recording required deed notices, etc.

Historical guidance regarding “continuing obligations” is presented in the 2003 EPA common element guidelines available from the EPA Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>.

What are reasonable steps?

Reasonable steps are site specific, post-acquisition obligations by the LLP user (BFPP, CPO, and ILO).

In general, reasonable steps include actions to:

- Stop any continuing releases.
- Prevent any threatened future releases.
- Prevent or limit human, environmental or natural resource exposure to any hazardous substance released on or from the property.

Some examples of taking reasonable steps include:

- Additional sampling to determine the nature and extent of suspected contaminants.
- For a proposed building, including safeguards to mitigate gases or vapors that would otherwise enter the building (vapor intrusion protection).
- Minimizing disturbance of existing contamination.
- Not pumping or drinking contaminated groundwater.
- Capping contaminated soils with a minimum of (say) two feet of soil and/or a building or paved parking lot.
- Preventing access (physical or institutional).
- Over-packing rusty/leaking drums.
- Emptying waste tanks.

ASTM organized the Continuing Obligation Task Group to work on a draft continuing obligation standard to guide users in maintaining CERCLA liability protection which will, among other things, define reasonable steps. One reasonable steps statutory requirement is that the owner must prevent or limit human, environmental, or natural resource exposure to any previous released hazardous substance. As the task group develops the standards, it appears that they have identified two broad actions that may be taken to meet the requirement, namely: (i) lower contaminant levels (i.e., remediate); or (ii) preclude exposure (e.g., through institutional or engineered controls). In either case, Phase II site assessment data, at a minimum, may be necessary in order to understand how to achieve the task group's objectives. CERCLA requires that reasonable steps are taken to maintain the LLP. These reasonable steps logically might require that a Phase II ESA be conducted to confirm whether there is any contamination, where contaminants are located, and the levels of contamination. It is unlikely that protective

measures can be identified, designed, or implemented properly without such data.

Institutional controls such as land use restrictions (e.g., prohibiting residential development) require that the nature and location of the contamination be determined to some degree. Engineering controls such as construction barriers also require the nature and location of the contamination to be determined to support design efforts.

Clearly understanding potential continuing obligations and reasonable steps prior to the acquisition of the property will help direct the purchaser's future development, redevelopment, or build out options for the property. It may be determined that the purchaser cannot implement the plan envisioned for the property because of identified constraints. A clear vision of the future property use, potential end users, and an exit strategy may be critical in order to implement an effective redevelopment strategy.

Writing continuing obligations and reasonable steps opinions

Based on the outcome of the ESA, it may become clear that identified "recognized environmental conditions" (RECs) associated with the property will require additional and on-going attention in the form of continuing obligations and taking reasonable steps. At this time, the purchaser/owner must have a good grasp of their final goals and objectives in order to determine if the envisioned redevelopment is possible based on site conditions established during the AAI ESA completed by their consultant.

Transactional timelines for real estate transactions are always unpredictable as many variables and parties can affect them. On the federal level, BFPP protections are self-implementing and maintaining that liability protection does not require the purchaser/owner to obtain EPA's approval or oversight in securing the BFPP, implementing continuing obligations, or taking reasonable steps. This is not necessarily true for states that offer similar liability protection programs. The federal BFPP only offers federal liability protection and this protection may not be honored by a state with a

similar program. If a state eventually requires a remedial action plan to satisfy your reasonable steps and continuing obligations requirement, it could take a considerable amount of time to get formal approval to implement the remedial action plan, thereby delaying your project. In most cases, real estate transactions cannot wait for approvals that could be months or, in some cases, years away.

So how does a buyer get an indication of what constitutes reasonable steps or continuing obligations? Hopefully you have chosen a consultant that knows the local regulators and how they normally react to site conditions. You might consider instructing your consultant to include recommendations in the form of reasonable steps and continuing obligations opinions either as part of the ESA or in a separate document. Your consultant should then orally discuss those options with you that comply in a manner that is consistent with prevailing state standards and agency track record. EPA, for example, encourages you to open a dialogue with your state agency allowing them to provide input into your selection process for reasonable steps. Alternatively, you might consider having your legal advisors send a letter of intent to your relevant agency outlining site conditions and presenting the continuing obligations you have identified and what reasonable steps you plan to take.

Some buyers may want their consultant to define their continuing obligations and reasonable steps recommendations in the ESA report in order to help maintain liability protection gained by completing the ASTM E 1527-05 ESA. Consultants would be well advised to discuss this with their client prior to making recommendations in the ESA regarding ongoing measures. Since the client may not have clear plans for the future development, redevelopment, or build out of the property, the consultant should not limit the client's options by documenting future efforts that might impact the property's ultimate use, unless instructed to as part of the ESA scope of work.

After completing the ESA, the consultant should sit down with the developer and document the need for continuing obligations, reasonable steps, and the anticipated property reuse. Those details will be useful

in helping the developer pull together a specific action plan tailored to the property.

It should also be noted that a number of states are adopting various liability protection schemes (BFPP, etc.) and are implementing proscriptive programs that help package and document the defenses. These programs may include a BFPP letter issued from the state. Some states are also tying these defenses to their Voluntary Cleanup Programs either directly or indirectly through tax incentives for redevelopments that go through such a program. Consultants will need to help clients determine the best route or program from a liability and financial benefits point of view based on their ultimate objectives and site characteristics.

Conclusion

There is no better time in history to purchase and redevelop environmentally impaired real estate. These sites can offer great potential financial returns and provide positive social impacts. By properly completing environmental due diligence following the federal AAI Rule, a developer takes the initial steps in protecting itself from CERCLA liability. The results of an ESA may clearly direct additional efforts in the form of reasonable steps and continuing obligations in order to perfect and preserve the liability protection beyond the completion of the ESA. Now, more than ever, legal advisors need to work with environmental consultants to assure that reasonable steps for a transaction are identified, practical, and credible and will pass state-specific hurdles and requirements.

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MESSAGE FROM THE CHAIR

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As this newsletter goes to press, we await with bated breath a new administration that has promised substantial change in the environmental area. How will President Obama's appointee to be the next administrator of EPA affect existing and new environmental programs? Will Congress pass a climate change bill? We also continue to brace ourselves against the ongoing adverse effects caused by the global economic crisis. Will developers be able to obtain financing for brownfields deals? What types of environmental insurance will be available?

Within the Environmental Transactions and Brownfields (ETAB) Committee, we have been working to provide you with better tools to keep you up-to-date on these developments. On our Web site (<http://www.abanet.org/enviro/committees/envtab/>) we have added links to other useful Web sites and announcements of upcoming conferences that we think should be of interest to you. We are also starting a discussion board to facilitate conversations between committee members about topics of interest to you. One of our initial topics will be environmental due diligence standards that have been, or are being developed by ASTM on various topics, including Phase II environmental site assessments, vapor intrusion, continuing obligations, environmental disclosure, and climate change. We will use our list serve to let you know when new topics are being posted for discussion.

In this newsletter, we have articles focused upon the state of the environmental insurance market after the AIG bailout. Another article discusses developments in the lending community regarding "green" pressures. Next, we have an article about EPA's interim audit policy for new owners. Finally, we have an article about "continuing obligations" and "reasonable steps" under the Brownfields Amendments of 2002.

If you have topics that you would like to see addressed in future newsletters, let me know. I can be reached at amy.edwards@hkclaw.com. And if you would like to get more involved in any of the committee's activities, just let me or any of the ETAB vice chairs know. All of our contact information is listed on the ETAB Web site.

ENVIRONMENTAL INSURANCE IN THE WAKE OF THE AIG BAILOUT

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The recent turmoil in the financial markets and the near collapse of American International Group Inc. (AIG) have left many brownfield developers and environmental insurance policyholders wondering about the future of the environmental insurance market. Significant confusion exists over the causes of AIG's liquidity concerns, whether other insurance providers are similarly exposed, and the ability of these insurers to pay claims on existing policies and issue new