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# **Environmental Due Diligence in Connection with the Acquisition and Re-Development of Property**

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# Liability Scheme under CERCLA

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- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)
- 42 U.S.C. §§ 9601 et. seq.
  - Strict liability
  - Joint and Several liability

# Liability Scheme under CERCLA

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- Who is liable?
- Potentially Responsible Parties (PRPs)
  - Current Owners and Operators
  - Past Owners and Operators
  - Generators (or Arrangers)
  - Transporters

# 42 U.S.C.A. § 9607

## § 9607 Liability

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- (b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by –

(1) an act of God

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

## 42 U.S.C. § 9607(b)(3)

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- Requires a PRP to plead and prove a) that the release or threat of release at issue was caused solely by the acts or omissions of a third party; b) that such acts or omissions did not occur in connection with a contractual relationship existing directly or indirectly between the PRP and the third party; c) that the PRP has exercised due care with regard to the contamination; and d) that the PRP took reasonable precautions against foreseeable acts or omissions of the third party.

## (35)(A)

- The term “contractual relationship”, for the purpose of section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
  - (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.
  - (ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation.
  - (iii) The defendant acquired the facility by inheritance or bequest.

In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

# 35 (B)

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- (B) Reason to know
  - (i) All appropriate inquires
  - To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a court that—
    - (I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquires, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices; and
    - (II) the defendant took reasonable steps to—
      - (aa) stop any continuing release;
      - (bb) prevent any threatened future release; and
      - (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.

## (40) Bona Fide Prospective Purchaser

- The term “bona fide prospective purchaser” means a person (or a tenant of a person) that acquires ownership of a facility after the date of the enactment of this paragraph and that establishes each of the following by a preponderance of the evidence:
  - (A) Disposal prior to acquisition
    - All disposal of hazardous substances at the facility occurred before the person acquired the facility.
  - (B) Inquiries
    - (i) In general

The person made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices in accordance with clauses (ii) and (iii).
    - (ii) Standards and practices

The standards and practices referred to in clauses (ii) and (iv) of paragraph (35)(B) of this section shall be considered to satisfy the requirements of this subparagraph.
    - (iii) Residential use

In the case of property in residential or other similar use at the time of purchase by a nongovernmental or noncommercial entity, a facility inspection and title search that reveal no basis for further investigation shall be considered to satisfy the requirements
  - (C) Notices
    - The person provides all legally required notices with respect to the discovery or release of any hazardous substances at the facility.



# (40) Bona Fide Prospective Purchaser

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- (D) Care
  - The person exercises appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to--
    - (i) stop any continuing release;
    - (ii) prevent any threatened future release; and
    - (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.
- (E) Cooperation, assistance, and access
  - The person provides full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration at a vessel or facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response actions or natural resource restoration at the vessel or facility).
- (F) Institutional control
  - The person--
    - (i) is in compliance with any land use restrictions established or relied on in connection with the response action at a vessel or facility; and
    - (ii) does not impede the effectiveness or integrity of any institutional control employed at the vessel or facility in connection with a response action.

# (40) Bona Fide Prospective Purchaser

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- (G) Requests; subpoenas
  - The person complies with any request for information or administrative subpoena issued by the President under this chapter.
- (H) No affiliation
  - The person is not--
    - (i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through--
      - (I) any direct or indirect familial relationship; or
      - (II) any contractual, corporate, or financial relationship (other than a contractual, corporate, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or
    - (ii) the result of a reorganization of a business entity that was potentially liable.

# Eight BFPP Requirements

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1. Disposal prior to acquisition
2. All Appropriate Inquiry
3. Provide Legally Required Notices
4. Reasonable Steps (Care)
5. Cooperation, Assistance, and Access
6. Compliance with Continuing Obligations and Requests
7. Compliance with Information Requests
8. Affiliation

# CERCLA Bona Fide Prospective Purchaser (BFPP)

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- Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431 (D.S.C. 2011), affirmed, 714 F.3d 161 (4th Cir. 2013)
- Standards and Practices for All Appropriate Inquiry, 70 Fed. Reg. 66, 070 (Nov. 1, 2005) 40 CFR Part 312

# Ashley: Overview

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A lengthy decision with a complex factual history providing a discussion of CERCLA liability generally, and lessons on meeting all eight BFPP requirements.

Background:

- Plaintiff and current owner of a 43 acre Brownfield site in Charleston, South Carolina (Ashley) brought suit under CERCLA § 107 (42 U.S.C. § 9607) to recover remediation costs from former site owners
- Defendant and former site owner (PCS Nitrogen) counterclaimed, seeking contribution from current owner (Ashley) contending it had also contaminated the site
- Ashley raised BFPP defense

## Ashley: Key Facts

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- 1906-1985: Site occupied/contaminated (lead and arsenic widespread in soil) by phosphate fertilizer manufacturing
- 1987-2003: Holcombe and Fair purchases land with intent to develop and subdivide
- Ashley acquires 27.62 acres from Holcombe and Fair in 2003 for development
- Environmental investigations conducted in September 2003
- EPA information request in 2004; Ashley collects 450 soil samples
- Ashley discovers stained soil and trash pile on Site in 2006
  - Tests for soil, but only for lead and arsenic
  - Fails to remove trash pile

# Ashley: Key Facts

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- Ashley also acquires additional acres at site in 2008
- Updated environmental assessment in 2008 identifies sumps as recognized environmental conditions (RECs)
- Soil and sediment samples show contaminated soil
- As a result of the demolition of above-ground buildings, runoff collects in building pads, sumps and trench areas

# What the Court Concluded Ashley Did Right

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- All Appropriate Inquiries (AAI)
  - “What is important is that Ashley acted reasonably; it hired an expert to conduct an AAI and relied on that expert to perform its job properly. The Court finds that Ashley properly conducted AAI.” (791 F. Supp. 2d at 500)
- Compliance with Continuing Obligations and Requests (Institutional Controls)
  - “The Court finds that Ashley has met its burden of proof on this element.” (791 F. Supp. 3d at 501)
- Cooperation, Assistance, and Access
  - The record demonstrates that Ashley’s cooperation with EPA has been ongoing since it purchased the site. (791 F. Supp. 2d at 501)
- Compliance with Information Requests
  - “Ashley has complied with all information requests and subpoenas issued by EPA.” (791 F. Supp. 2d at 502)
- Provided Legally Required Notices
  - “The record does not establish that any releases occurred on the Site subsequent to Ashley acquiring ownership. The court finds that Ashley has met its burden of proving that it made all legally required notices.” (791 F. Supp. 2d at 500)



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## What the Court Concluded Ashley Did Wrong

- “The court concludes that Ashley did not exercise appropriate care with regard to hazardous substances. First, [the environmental consultant] identified the sumps and concrete pads at the Allwaste parcel as RECs. When Ashley demolished all of the above-ground structures on the Allwaste parcel, but failed to clean out and fill in the sumps, leaving them exposed to the elements, it may have exacerbated these conditions.” (791 F. Supp. 2d at 501)
- “Second, Ashley’s failure to 1) prevent a debris pile from accumulating on the Site, 2) investigate the contents of the debris pile, and 3) remove the debris pile for over a year indicates a lack of appropriate care.” (791 F. Supp. 2d at 501)
- “Third, Ashley failed to adequately maintain the ROC cover on the Site. For example, the ROC cover on the parcel Ashley leased to Allwaste from 2003 to 2008, was deteriorated in 2004.” (791 F. Supp. 2d at 501)

## Fourth Circuit Appeal (2013) (714 F. 3d 161)

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- Ashley “failed to demonstrate that it exercised ‘appropriate care’ at the site.” (714 F.3d at 181)
- Ashley did not take the “reasonable steps to...prevent any threatened future release...that a similarly situated reasonable and prudent person would have taken...” (714 F. 3d 181)
- Court of Appeals affirmed lower court finding that Ashley failed to establish all eight factors required to obtain BFPP status. (714 F.3d 161, 181)