Liability Concerns in Brownfields Redevelopment: A Case Study

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The Case

Ashley II of Charleston, LLC. v. PCS Nitrogen, Inc., et. al.

- CERCLA private cost recovery action with 3rd party contribution claims.
- Principal Issues:
  - **Successor liability** of PCS for former owner/operator
  - **Divisibility of harm** at the Site – joint and several liability
  - Ashley's **BFPP status** for liability protection
  - PCS **contribution claims** – equitable allocation among PRPs on
    - Innocent landowner defense
    - Liability of tenant
    - Liability of City of Charleston
    - Current owner status questioned

Key Rulings

May 27, 2011 Court's final Order:
791 F.Supp.2d 431 (D.S.C.)*

- PCS has successor liability to former owner/operator
- Harm is not divisible - joint & several liability applies
- **Ashley failed to meet its burden of proof on BFPP**
  - Disqualifying **'Affiliation'** with a PRP
  - Failed to exercise **'Appropriate Care'**
  - Failed to prove all **'Disposal'** prior to acquisition
- **On appeal to U.S. Fourth Circuit Court of Appeals; oral arguments tentatively scheduled for December, 2012.**

The Site

- The **Columbia Nitrogen Superfund Site** is a 43-acre parcel of land adjacent to the Ashley River in Charleston, South Carolina.
- **EPA's extensive investigation** prior to Ashley's 2003 purchase: Phase I and II Remedial Investigation and 2002 Feasibility Study.
- The **environmental harm** in soils, sediments and groundwater across the Site was caused by the spread of principal contaminants, arsenic, lead and low pH conditions by historic operations of a phosphate fertilizer plant on-site.
- **2005 Enforcement Action Memorandum**: EPA determined this non-NPL listed Site meets the requirements for initiating a Non-Time-Critical Removal Action under the National Contingency Plan.


Property Boundary
ASHLEY RIVER
MILFORD ROAD
Koppers Co., Inc.
3-13-1985


11-15-2003
40' Critical Line Buffer
ASHLEY RIVER
Tidal Wetlands
Drainage Ditch

Ashley II of Charleston, LLC

- The Site is part of 200+ acre multi-use Magnolia Development
- Ashley's other remediation efforts in this project:
  - o 4 CERCLA sites and 16 state VCC sites
  - o All being cleaned-up in conjunction with former owners/operators, except this Site.
- Ashley's pre-and-post-purchase discussions and planning with EPA, SCDHEC, local agencies and community groups

EPA Letter of Support
November 19, 2007

EPA Region 4 Superfund Director:

"The EPA supports Magnolia as an exciting project consistent with EPA's mission to revitalize land by restoring contaminated sites to productive economic and green space use."

SCDHEC Letter of Support
December 19, 2007

SCDHEC Brownfields / Voluntary Cleanup Program

- "The Department looks forward to working closely with Ashley to implement these plans to restore these contaminated sites to productive use."
- "The Department supports the proposed Magnolia redevelopment as a prime example of the goals of the Brownfields Program to revitalize underused properties and bring them to a productive and beneficial reuse."

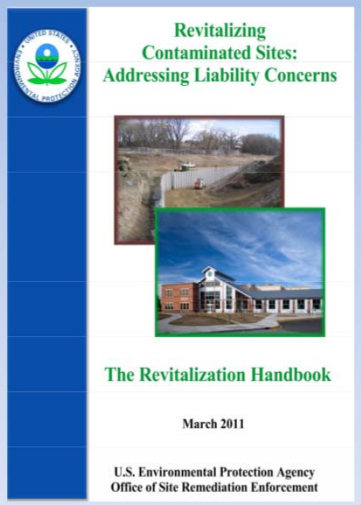
Ashley's Intention:
Bona Fide Prospective Purchaser Status

Subtitle B of the Brownfields Amendments, through the addition of CERCLA section 107(r), provides a **limitation on liability** for a "bona fide prospective purchaser" whose potential liability is based solely on the purchaser's being an owner or operator of a facility, and provided that the purchaser does not impede the performance of a CERCLA action.

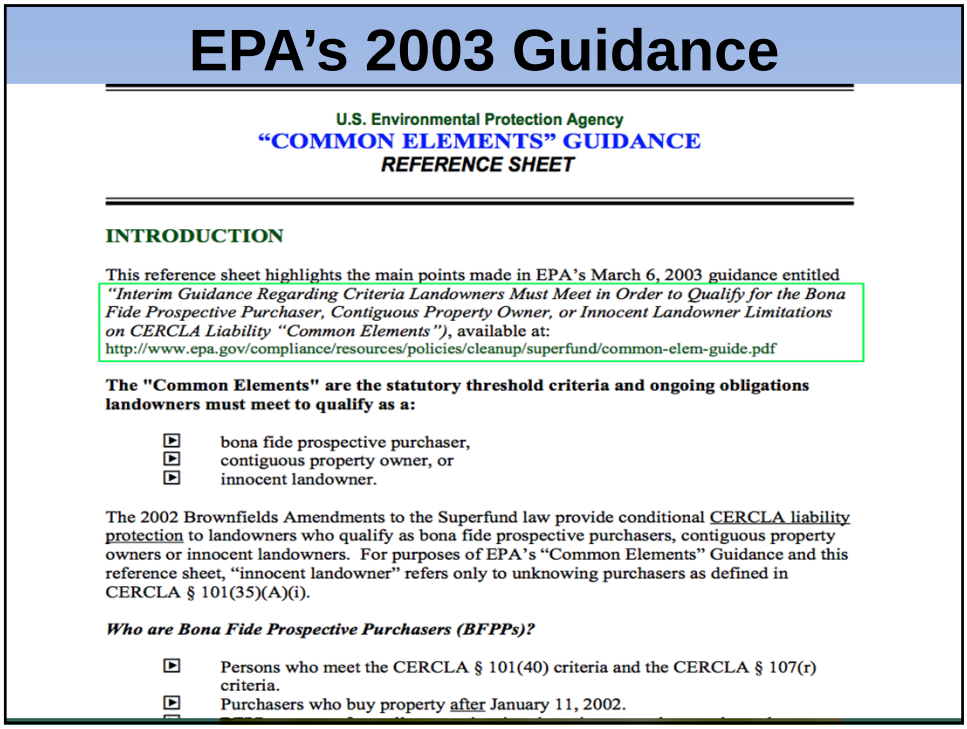
2002 Brownfields Amendments

"Many communities and entrepreneurs have sought to redevelop brownfields. Often they could not, either because of excessive regulation or because of the fear of endless litigation. As a consequence, small businesses and other employers have located elsewhere, pushing development farther and farther outward, taking jobs with them and leaving cities empty."- President GW Bush January 11, 2002

EPA's 2011 Revitalization Handbook



EPA's 2003 Guidance



U.S. Environmental Protection Agency
"COMMON ELEMENTS" GUIDANCE
REFERENCE SHEET

INTRODUCTION

This reference sheet highlights the main points made in EPA's March 6, 2003 guidance entitled *"Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for the Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability "Common Elements"*, available at:
http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf

The "Common Elements" are the statutory threshold criteria and ongoing obligations landowners must meet to qualify as a:

- bona fide prospective purchaser,
- contiguous property owner, or
- innocent landowner.

The 2002 Brownfields Amendments to the Superfund law provide conditional CERCLA liability protection to landowners who qualify as bona fide prospective purchasers, contiguous property owners or innocent landowners. For purposes of EPA's "Common Elements" Guidance and this reference sheet, "innocent landowner" refers only to unknowing purchasers as defined in CERCLA § 101(35)(A)(i).

Who are Bona Fide Prospective Purchasers (BFPPs)?

- Persons who meet the CERCLA § 101(40) criteria and the CERCLA § 107(r) criteria.
- Purchasers who buy property after January 11, 2002.

Key BFPP Issues in *Ashley*

BFPP must establish that:

- all **disposal** occurred prior to acquisition;
- all **appropriate inquiries** into previous ownership and uses of the facility were made
- person exercises **"appropriate care"** with **hazardous substances** found at the facility by taking **"reasonable steps"**
- the person is not **"affiliated"** with any potentially responsible party through:
  a) direct or indirect familial relationship, or
  b) any contractual, corporate or financial relationship (excluding relationships created by instruments by which title to facility is conveyed or financed).

"Reasonable Steps"

BFPPs are required to take "Reasonable Steps" to:

1. Stop continuing releases
2. Prevent threatened future releases, and
3. Prevent or limit human, environmental, or natural resource exposure to earlier hazardous substance releases.

"Reasonable Steps"

EPA's *Common Elements Guidance*, March 2003:

"In requiring reasonable steps from parties qualifying for landowner liability protections, EPA believes Congress did not intend to create … the same types of response obligations that exist for a CERCLA liable party (e.g., removal of contaminated soil), but that **Congress intended to withhold liability protection only from those parties that completely ignored the dangers associated with hazardous substances on their property**."

Ashley's Ownership

- On-going discussions with EPA for a year prior to purchase
- Prepared Environmental Site Assessment prior to purchase, which incorporated EPA's 2002 Feasibility Study Report.
- Hired environmental engineer with experience on over 30 Superfund sites to ensure compliance with BFPP requirements.
- Provided security and conducted periodic site inspections.
- Fenced, gated, and put up "No Trespass" signs.
- Upon acquisition, explicitly requested that EPA inform Ashley if EPA desired "specific cooperation, assistance, access, or the undertaking of any reasonable steps at the site."

Court finds…

Ashley did not exercise appropriate care:

1. Failed to prevent **debris pile** from accumulating on the site, investigate the contents of the debris pile, and remove the debris pile for over a year.

2. 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.

3. **Allwaste concrete pads and sumps**. Demolished all above-ground structures, but failed to clean out and fill in the sumps, which ***may have exacerbated these conditions***. Ashley's later action to test, clean and fill the sumps came too late to prevent ***possible*** releases.

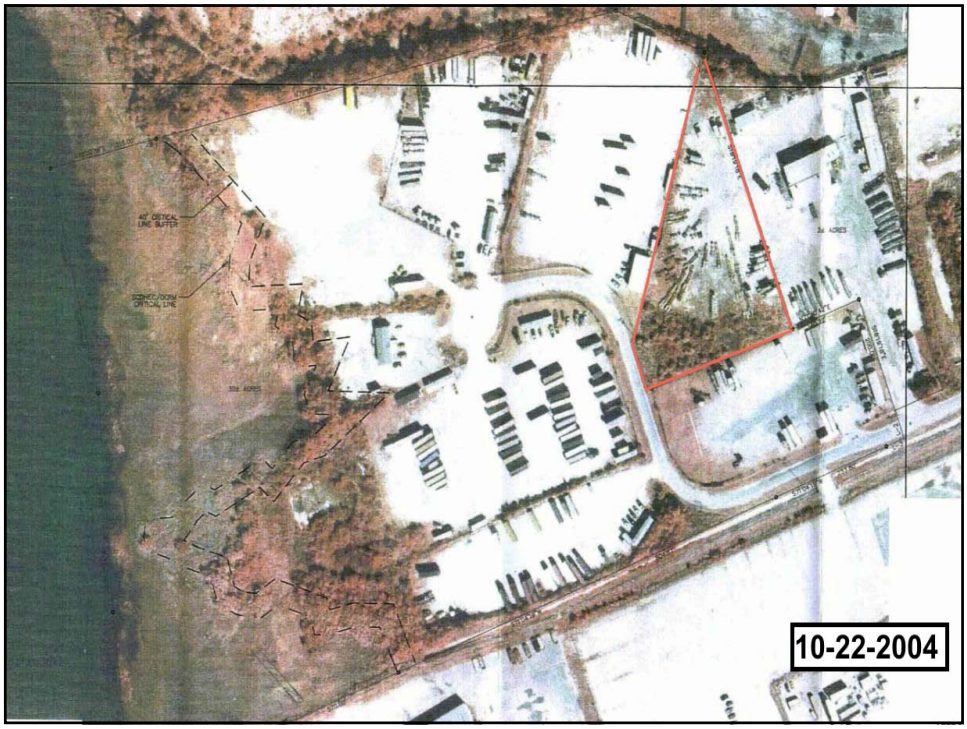
Debris Pile

- Wooden pallets, paper, straw, packing material, used tires, miscellaneous trash.
- EPA and SCDHEC officials inspected Site in 2007 and made no comment on debris. Ashley removed all debris
- PCS sampled soil after debris removed
- No detected chemicals exceeded EPA Screening Levels or the site-specific remedial goals.
- Hazardous substances on-site not affected

Debris Pile

ROC Limestone Cover

- Approximately 80% of upland covered in ROC prior to Ashley's purchase. 100% never required.
- EPA was sampling on-site for a week in April, 2005 without commenting on ROC. EPA and SCDHEC officials inspected Site in 2007 and made no comment on ROC cover.
- During 2006 inspection Ashley noticed stained soil not covered by sufficient ROC. Ashley investigated, sampled and covered with new layer of ROC.
- No evidence that any deteriorated ROC affected hazardous substances.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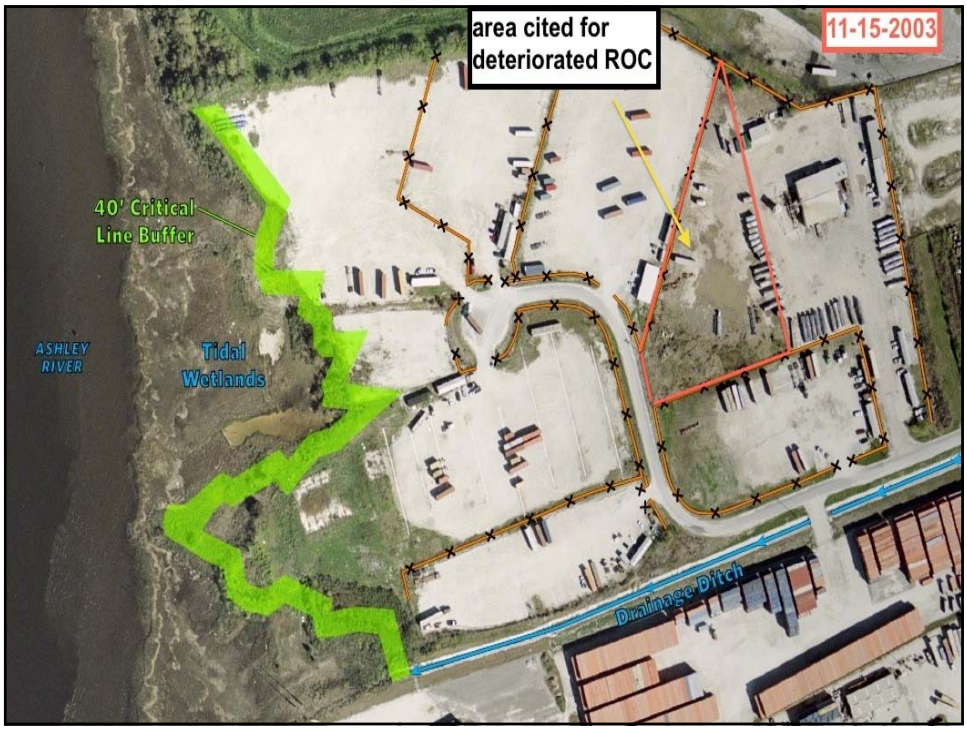
area cited for deteriorated ROC
11-15-2003
40' Critical Line Buffer
ASHLEY RIVER
Tidal Wetlands
Drainage Ditch

Allwaste Concrete Pads & Sumps

- Pre-purchase ESA's identified RECs. Before relocating, Allwaste pumped out sumps. Testimony that pumps would remove sludge from sumps.
- Ashley purchased parcel in 2008 and removed all above-ground structures, leaving concrete pads and sumps.
- Before taking title, Ashley prepared plans for appropriate building and subsurface structure demolition. Work to be coordinated with other redevelopment activities. 2008 Recession affected activities.
- Ashley did not clean out and fill in sumps, leaving them exposed to elements - did not punch through concrete to investigate soil beneath.
- Analysis of hazardous substances in sumps - not soluble – would not cause actionable release.
- The Court found that the Record does not establish that any releases occurred on the Site after Ashley acquired ownership.

No "Affiliation"
CERCLA Section 101(40)(H)

- To meet the statutory criteria of a BFPP, a party must not be potentially liable or affiliated with any other person who is potentially liable for response costs.

- Neither the BFPP provisions nor the legislative history define the phrase "affiliated with."

- However, it is taken as broadly defined, covering direct and indirect familial relationships, as well as many contractual, corporate, and financial relationships.

EPA Guidance (before trial)

2003 Common Elements Guidance

- "It appears that Congress intended the affiliation language to prevent a (PRP) from contracting away its CERCLA liability through a transaction to a family member or related corporate entity."

- "EPA recognizes that the potential breadth of the term 'affiliation' could be taken to an extreme, and in exercising its enforcement discretion, **EPA intends to be guided by Congress' intent of preventing transactions structured to avoid liability**."

"Affiliation" in Ashley Case

- **Ashley's contractual relationships** with PRPs (sellers) **were created by the purchase agreements**
- In purchase agreements, **Ashley released sellers** from all claims **and agreed to indemnify**.
- **No CERCLA liability was transferred or avoided**.
- **In negotiating a BFPP agreement with EPA, Ashley requested EPA to release the Holcombe and Fair Parties (sellers) from liability for EPA's past response costs incurred at the Site.**

Court finds…

- Ashley's relationship with the Holcombe and Fair Parties was a disqualifying affiliation.
- In **indemnifying** the Holcombe and Fair Parties, Ashley took the risk that the Holcombe and Fair Parties might be liable for response costs.
- **Ashley's efforts to discourage EPA** from recovering response costs covered by the indemnification "reveals just the sort of affiliation Congress intended to discourage."

EPA's 2011 Guidance on 'Affiliation'

EPA's '*Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA's Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections*,' Sept. 21, 2011.

- EPA recognizes the uncertainty.
- This is intended to assist EPA personnel in exercising the Agency's enforcement discretion.
- It is not a regulation and does not create any substantive rights for any persons.

2011 Affiliation Guidance (cont'd)

In light of Congressional intent to prevent a PRP from contracting away its CERCLA liability, EPA "generally intends ***not*** to treat the following as disqualifying affiliations":

- Relationships at other properties
- Post-acquisition relationships
- **Relationships created during title transfer**
- Tenants seeking to purchase property they lease.

2011 Affiliation Guidance (cont'd)

Documents that Typically Accompany Title Transfer:

"**EPA generally does not intend to treat certain** contractual or financial relationships (*e.g.*, certain types of **indemnification** or insurance agreements) that are typically created as a part of the transfer of title, although perhaps not part of the deed itself, **as disqualifying affiliations**."

- Indemnification agreements do not relieve a party of its CERCLA liability.
- In footnote 17 to the above quote, EPA cautions: "please note" the recent decision in ***Ashley v. PCS***

Disposal

"Discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water." 42 U.S.C. § 9601(29).

4th Circuit on 'Disposal'

Nurad, Inc. v. William E. Hooper & Sons Co. (1992):
• Disposals include **not only active involvement** in the 'dumping' or 'placing' of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was **'spilling' or 'leaking**.'

• 42 U.S.C. § 9607(a)(2) imposes liability not only for active involvement in the "dumping" or "placing" of hazardous waste at the facility, but for ownership of the facility at a time that hazardous waste was "spilling" or "leaking."

• A requirement conditioning liability upon affirmative human participation in contamination … frustrates the statutory purpose.

Allwaste Concrete Pads & Sumps

- Ashley had the affirmative burden of **proving a 'negative**' – that no 'disposal' occurred after its acquisition of the Allwaste parcel.
- June 2008, Ashley removes above-ground structures. The sumps had been pumped out by Allwaste, but they were not cleaned or filled in, leaving them exposed to elements.
- Ashley did not punch through concrete pads or sumps to investigate soil beneath. Plans existed for removal of concrete structures.
- September 2009, evaluation of sumps' leak potential; cleaning and filling sumps. No leaks found, but court found investigation insufficient.
- Analysis of material found in sumps; oily road dirt with some organics adsorbed was non-leachable and non-mobile material; water in contact with those materials in sump did not show any dissolved constituents above MCLs or RWSLs. No impact on environment.

Court finds…

It is likely that there were disposals on the Allwaste property after Ashley tore down the structures on the Allwaste parcel in 2008 because the sumps contained hazardous substances, were cracked, and were allowed to fill with rainwater.

Because Ashley ***did not test under*** the concrete pads, sumps, or trench to see if the soil under those structures was contaminated, ***Ashley did not prove*** that no disposals occurred on the Site after its acquisition of the Site.

MISCELLANEOUS ISSUES

Innocent Landowner Defense

Must establish that:

- Performed all appropriate inquiries prior to purchase and does not know, or have reason to know, of contamination
- Another party was the **sole** cause of the release of hazardous substances and the damages caused
- Exercised **due care** with respect to the hazardous substances
- Took precautions against foreseeable acts or omissions of any third party and the consequences that could foreseeably result from such acts or omissions

source: 42 U.S.C. § 9607(b)(3)

Innocent Landowner Defense
Holcombe and Fair

Court finds: H&F failed to establish innocent landowner defense. Prior owners were not the "sole" cause of the contamination, because H&F contributed to contamination. H&F failed to exercise due care.

1. Contributed to Contamination:

"Agitated" contaminated soil in construction activities, causing new releases of hazardous substances.

2. Lack of Due Care:

- After discovering contaminated soil at the site, H&F made no effort to inform environmental authorities.
- H&F only placed ROC on parcels of the site as they were leased. Should have capped the entire site with ROC upon learning of the contamination.
- Began construction of detention ponds without EPA approval. Failed to maintain detention ponds on site.

Innocent Landowner Defense

RHCE

Court finds: RHCE failed to establish innocent landowner defense. Prior owners were not the "sole" cause of the contamination, because RHCE contributed to it. RHCE had some knowledge of contamination prior to purchase, and failed to exercise due care.

1. **Contributed to Contamination:**
   "Agitated" contaminated soil in construction activities, causing new releases of hazardous substances.

2. **Knowledge of Contamination:**
   H&F disclosed at least some of the contamination to RHCE before the parcel was conveyed to Hood, President of RHCE.

3. **Lack of Due Care:**
   The grading and proof rolling of the parcel indicates a lack of due care on the part of RHCE when it had knowledge of the contamination.

Current Owner Liability

City of Charleston

Court finds: City is a PRP as a current owner of part of the site. (Allocated zero % responsibility)

Looked at the Deed:

1. H&F's intent was to grant to the City the Milford Street extension in fee simple.
2. H&F "remised, released, and forever quit-claimed" the Extension of Millford Street to the City.
3. H&F retained no interest in the premises, as the deed provided that H&F shall not "at any time hereafter, by any way or means, have, claim, or demand any right or title to the aforesaid premises or appurtenances, or any part of parcel thereof, forever."
4. The deed makes no provision for the property to revert to H&F, indicating that all rights in property were transferred to the City.

Current Owner Liability

Allwaste

Court finds: Allwaste is liable as current owner, even though at the time of trial it was not an owner or operator of any part of the site.

1. Ownership status in CERCLA cases is determined at the time of the filing of the complaint.
2. This action was filed in 2005. Allwaste did not sell its parcel to Ashley until 2008.

3000 E. Imperial, LLC. v. Robertshaw Controls Co.
2010 WL 5464296 (C.D. Cal. 2010)

Court finds: Contaminated property purchaser (Imperial) exercised "appropriate care" and, in turn, satisfied the BFPP defense.

- **Pre-Purchase:**
  - Imperial conducted Phase I and Phase II
  - Knew of leaking USTs and solvent contamination that was ongoing at time of purchase.
- **Exercised Appropriate Care:**
  - Enrolled site in CAL VCP
  - Sampled USTs after purchase
  - Pumped out tanks 6 months later
  - 2 years later, excavated tanks
  - Small amount of TCE found in 1 of 9 USTs

Points to Consider

- **BFPP status will be highly scrutinized** by all interested parties, including agencies, PRPs and the courts.
- **EPA's support**, encouragement and involvement are helpful, but not determinative.
- **EPA Guidance Documents** are not determinative.
- **BFPP is a 'legal' issue** - the **different perspectives** of courts, EPA, engineers, developers and lawyers need to be appreciated.
- Despite EPA's 2011 Guidance, the '**affiliations'** issue remains a very fact specific inquiry.

Points to Consider

- 'Appropriate care' and 'reasonable steps' are **continuing obligations** and moving targets.
- **Scheduling action** around redevelopment plans may defeat BFPP status
- **extreme** '**housekeeping**' may be required for 'appropriate care'
- **Intrusive sampling** may be required to prove no disposal.

Points to Consider

- **Maximize inquiries into site conditions**:
  - Concrete pads, sumps, sub-surface conditions, underground tanks or other waste holding receptacles
- **Maximize inquiries about site history and all PRPs**
  - What did they do at the Site?
  - Relevant to appropriate care & reasonable steps analysis
- **Are there solvent PRPs** able to pay response costs?
- **Is harm 'divisible'** (another legal issue)?

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