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## ***PCS Nitrogen v. Ashley II: Prospective Purchasers Beware***

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On April 4, 2013, the Fourth Circuit Court of Appeals issued a much-anticipated decision in *PCS Nitrogen Inc. v. Ashley II of Charleston, LLC*, No. 11-1662, 2013 WL 1340018 (4<sup>th</sup> Cir. April 4, 2013) ("*Ashley II*"), available at <http://www.ca4.uscourts.gov/Opinions/Published/111662.P.pdf> (last viewed Apr. 24, 2013). It is the first appellate decision interpreting the "bona fide prospective purchaser" ("BFPP") defense. This defense exempts certain qualified individuals and entities from the stringent federal environmental cleanup liability imposed under the *Comprehensive Environmental Response, Compensation, and Liability Act* ("*CERCLA*"). This significant decision occurred 11 years after Congress adopted the BFPP defense with the hope that it would "promote the cleanup and reuse of brownfields."

*Ashley II* concerns environmental contamination that resulted from approximately 100 years of fertilizer manufacturing at a site in Charleston, South Carolina. After a series of transactions, Ashley II of Charleston, LLC became the current owner of a portion of the site. It brought a cost recovery action against the corporate successor of the manufacturer, PCS.

The decision addresses a number of notable liability issues arising under CERCLA: corporate succession of CERCLA liability; liability from secondary disposal activities caused by subsequent construction activities; current operator liability from a leasehold

on part of a "facility"; and apportionment of liability among potentially responsible parties ("PRPs").

The focus of this article, however, is the court's interpretation of the BFPP defense, and specifically the element of the appropriate care taken with respect to existing or discovered contamination after the purchaser acquires title to the property. To that point, the court made it clear that the purchaser must meet each element of the BFPP defense by preponderance of evidence.

Before it acquires title, the purchaser must: (1) have acquired title to the property after January 11, 2002; (2) have made all appropriate inquiries into the site's history; (3) show that all hazardous waste disposals occurred at the facility before its ownership; and (4) have no affiliation with any prior owner or operator.

After acquiring title, the purchaser has the continuing obligations to: (1) not impede the performance of a response action or natural resource restoration; (2) provide all appropriate notices regarding any discovered contamination; (3) exercise "appropriate care" with respect to hazardous substances found at the facility by taking reasonable steps to contain and prevent contamination; (4) fully cooperate with all authorized remediation personnel; (5) comply with all required institutional controls; and (6) respond to all subpoenas and information requests.

Of particular note, the purchaser in *Ashley II*, "Ashley," failed to meet the "appropriate care" standard by not taking reasonable steps to address the known contamination. The court stated that this standard required Ashley to take "all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances." *Ashley II*, 2013 WL at \*14 (internal citation omitted). The court found it notable that Ashley failed to (1) remediate and fill in contaminated sumps that were discovered when related aboveground structures were demolished, and (2) monitor and address an existing and deteriorating control measure that had been taken by the prior owner to mitigate the exposure of existing soil contamination (e.g., debris piles and limestone crush and run cover).

In reaching this decision, the court rejected a number of notable arguments raised in Ashley briefs.<sup>[2]</sup> First, the court declined to apply the less-stringent standard of "appropriate care" and "reasonable steps" for which Ashley was advocating. Specifically, Ashley wanted the level of care found in other CERCLA provisions—like the one under the innocent landowner defense—to apply. To this argument, the court stated:

Logic seems to suggest that the standard of "appropriate care" required of a BFPP, who by definition knew of the presence of hazardous substances at a facility, should be *higher* than the standard of "due care" required of an innocent landowner, who by definition "did not know and had no reason to know" of the presence of hazardous substances when it acquired a facility.

We need not here determine whether the BFPP standard of "appropriate care" actually is higher than the standard of "due care" mandated elsewhere in CERCLA, because in all events "appropriate care" under § 9601(40)(D) is at least as stringent as "due care" under § 9607(b)(3).

*Ashley II*, slip op. at 31, 2013 WL at \*13 (internal citation omitted).

Second, the court did not consider meaningful to Ashley's defense the fact that at the time it took title, Ashley asked the U.S. Environmental Protection Agency ("EPA") to inform it of actions that EPA considers continuing care obligations, or the fact that EPA never made a request of Ashley with which it did not comply.

Third, the court rejected Ashley's contention that the debris pile did not contain hazardous materials even though the area of the debris pile had been sampled and failed to disclose a level of contamination above EPA's levels of concern for the site, or that both EPA and the state agency had walked the site and did not ask Ashley to take any action. These factors led Ashley to believe that the debris pile lacked environmental significance that needed prompt remedial action. Therefore, Ashley left the piles to accumulate for years.

Fourth, the court did not find sufficient an appropriate care measure when Ashley only added four inches of additional limestone to cover a portion of exposed contaminated soil found to have elevated concentrations. Contrary to Ashley's arguments, the court found that the limestone had covered the entire site at one time. Ashley's failure to address the deterioration of the entire cover was not appropriate care.

Finally, the court found that Ashley failed to exercise appropriate care when it delayed in capping, filling, or removing contaminated sumps after their discovery. Ashley did not take immediate action because a letter from the prior owner stated that the area was "closed" under state regulations, the prior owner's manager testified that it had been remediated, and its environmental manager opined that the sumps did not require immediate attention. Instead, the court found as having more significance the admission of Ashley's expert witness to the effect that the sump "should have been filled a full year before," demonstrating that Ashley did not take reasonable steps to prevent threatened future releases. *Id.* at \*14.

With *Ashley II* clarifying the BFPP defense, the actions that prospective purchasers take before and after they acquire property become even more critical. The court's rejection of Ashley's arguments highlights several lessons for prospective purchasers of contaminated properties.

First, after conducting all appropriate inquiries—also known as the Phase I environmental site assessment—prospective purchasers must carefully evaluate the discovered recognized environmental conditions and what remedial measures they may need to take as owners in order to meet the appropriate care standard. Prudent prospective purchasers should evaluate the impact of the cost of the measures on the total value of the property and how to pay for them before moving forward with the transaction.

Second, after acquiring the property, purchasers must also ensure that they comply with other elements of the defense, including but not limited to complying with all institutional control measures, reporting the discovery of contamination, taking appropriate care of the discovered contamination, complying with existing institutional controls, and complying with information requests. These criteria can be a source of

significant concern for those considering properties located within or adjacent to highly contaminated sites, such as those on the National Priority List Superfund Site. In these cases, purchasers may end up implementing the remedial action to address existing contamination (in the form of source control measures), upgrading existing control measures, or responding to information requests from EPA.

Third, *Ashley II* calls into question the extent purchasers should rely on prior owners' compliance efforts in assessing whether to take remedial action to address the discovered contamination. In Ashley's case, reliance on those representations did not pay off. Purchasers should carefully evaluate representations and the facts on which they are based and compare that to the risk of not conducting additional investigations to verify the facts.

In sum, *Ashley II* has wide implications. While it is a seminal case in which the BFPP defense is analyzed against a specific and complicated set of facts, these types of facts are all too common in many cases. Given the heightened level of appropriate care the court expects prospective purchasers to meet, it remains to be seen whether this decade-old amendment to CERCLA will in fact accomplish the goals that Congress established in 2002: to "promote the cleanup and reuse of brownfields." Under *Ashley II*, the standard expected of a viable BFPP is nothing less than those of other PRPs.

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[2] These arguments were raised in Ashley's appellate briefs, which are on file with the author.

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