REVITALIZING THE BROWNFIELDS REVITALIZATION AND ENVIRONMENTAL RESTORATION ACT: HARMONIZING THE LIABILITY DEFENSE LANGUAGE TO ACHIEVE BROWNFIELD RESTORATION

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For many years, the nation's older cities have struggled with efforts to revitalize the decaying inner city industrial areas that past owners have largely abandoned. These environmentally contaminated properties, commonly known as brownfields and estimated to number in excess of 450,000 properties nationwide, often lie idle, with no productive economic activity and no contribution to the community's tax base. Real property investors and developers are afraid to acquire and redevelop these properties because of the sweeping liability scheme of the Federal Superfund statute known as the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). The mere fact of becoming an owner of the property would automatically make a purchaser a potentially liable party under CERCLA.

A broad coalition of the nation's mayors, the U.S. Environmental Protection Agency, state environmental agencies, commercial redevelopers, and others sought removal of the CERCLA liability disincentives for acquiring and redeveloping these properties to restore them to economic viability. In response, Congress unanimously adopted the so-called Brownfields Amendments to CERCLA in 2002. These amendments, among a number of provisions aimed at creating incentives for restoring brownfield properties, established safe harbors

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from CERCLA liability for innocent purchasers of contaminated properties – *i.e.*, owners that did not cause the contamination but who are willing to restore and develop the property in accordance with statutory conditions for environmentally-sound management of the property. But the problem persists because the courts, in a startling misapplication of *stare decisis*, continue to adhere to prior interpretations of CERCLA that frustrate implementation of the 2002 amendments.

The aim of this article is to identify impediments to achieving the congressional goal of revitalizing and cleaning up brownfield properties and to determine whether it is possible to overcome these impediments under the current statute. Although 13 years have elapsed since Congress passed the 2002 amendments, little has changed. From the standpoint of developers, the motto "no good deed goes unpunished" remains alive and well in the CERCLA program. Despite the clarity of Congress' *intent* in passing the amendments, the statutory text is a classic case of ambiguous, redundant, and confusing legislative drafting. The few courts that have addressed the 2002 amendments seem reluctant to interpret the amended CERCLA in light of clear legislative intent to facilitate community revitalization. For example, one part of the statute states that to qualify for CERCLA liability protection, all disposal of "hazardous substances" must predate the innocent purchaser's acquisition of the property. But several courts prior to 2002 construed the term "disposal" to include movement of existing contaminated soils within the property. Movement of soils is an inevitable consequence of any brownfield property redevelopment. Thus, developers who undertake the redevelopment that Congress sought to promote face a significant risk of disqualification from the CERCLA liability safe harbor.

Thus far, the handful of courts that have construed the Brownfields Amendments continue to view the actions of brownfield purchasers through the stringent CERCLA liability prism that created the conditions that led to enactment of the 2002 amendments. These courts have failed to appreciate that interpretive precedents that predate the 2002 amendments need to be reexamined in light of the starkly different legislative purpose of the amendments and the specific context of brownfield restoration. As a result, investor reluctance to acquire and develop these properties persists and the underlying contamination remains unaddressed.

The article demonstrates that Congress' aim of revitalizing the nation's inner cities through liability protection incentives for innocent purchasers of brownfield properties is achievable and that the

Brownfields Amendments can be made to work by careful use of less familiar but nonetheless well-established principles of statutory construction. The sponsors of the amendments, covering the full political spectrum from Senators Barbara Boxer (D-CA) and Hillary Clinton (D-NY) on one end to Senators Robert Smith (R-NH) and Larry Crapo (R-ID) on the other, emphasized that Congress was striking a balance between property redevelopment and environmental protection as a way of ending the impasse of doing nothing to clean-up these properties. Congress understood that it is unnecessary and counter-productive to apply the broad liability and remedial requirements typical of Superfund sites to restoration of brownfield properties.

When Congress seeks to remedy a problem by amending an existing statute that is the source of the problem rather than by enacting a new freestanding statute, courts must interpret the amended statute in light of the new congressional purpose and not allow prior judicial interpretations to thwart the new statutory remedy. The Brownfields Amendments may be at risk of judicial evisceration because of some courts' reluctance to revisit old precedents in light of the new amendments. If the Brownfields Amendments can be made to work, as the article demonstrates is achievable, abandoned properties can be developed and cleaned up, new businesses can be established that will create employment opportunities, and these idle properties can be transformed from economic and aesthetic liabilities to viable revenue producers for local communities.

I. INTRODUCTION

On January 11, 2002, President George W. Bush signed the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments"),[1] which, according to its title, aims "to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, [and] to enhance State response programs . . . ."[2] The new statute amended the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA" or "Superfund").[3] Congress enacted CERCLA to "promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination."[4] CERCLA's liability provisions sweep broadly.[5] They impose strict liability on (1) current owners of a property, (2) persons who owned or operated a property at a time when any disposal of hazardous substances occurred, (3) persons who arranged for disposal or treatment of hazardous substances or arranged for transport of

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[1] Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002), amending various sections of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675). Unless otherwise noted, references to the United States Code are to the 2012 edition.

[2] 115 Stat. at 2356. The term "brownfield site" is broadly defined in the statute as "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant." CERCLA § 101(39)(A), 42 U.S.C. § 9601(39)(A). Exceptions to this definition are listed in section 101(39)(B), 42 U.S.C. § 9601(39)(B).

[3] 42 U.S.C. §§ 9601–9675.

[4] Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 602 (2009) (quoting Consol. Edison Co. of N.Y. v. UGI Util., Inc., 423 F.3d 90, 94 (2d Cir. 2005)) (internal quotation marks omitted). *See also* Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996) (quoting General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990)).

[5] United States v. Bestfoods, 524 U.S. 51, 56 n.1 (1998) ("'The remedy that Congress felt it needed in CERCLA is sweeping: everyone who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.'" (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989) (plurality opinion of Brennan, J.))).

hazardous substances for disposal or treatment, and (4) the transporter who accepted hazardous substances for disposal or treatment.[6] Although the statute contains no specific model for allocating liability among multiple potentially responsible parties at a site,[7] the lower courts have generally applied a strict, retroactive, and joint and several liability formula.[8]

Consistent with the broad sweep of CERCLA's liability provisions, the defenses in the original statute were extremely narrow. The potentially liable party could avoid liability only by establishing that the release or threat of release of hazardous substances was caused solely by an act of God, an act of war, or an act of a third party.[9]

Throughout the 1990s, fears of CERCLA's broad liability provisions contributed to the growing problem of brownfields—abandoned or underutilized, contaminated or potentially contaminated property.[10] Thus, Congress enacted the 2002 Brownfields Amendments to encourage brownfields development by providing new liability defenses for "innocent" brownfields purchasers. According to one of its sponsors:

> These innocent parties are people who are interested in cleaning up the brownfield site, but they are afraid to get involved because they may become liable for somebody else's mess. Our

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[6] *Burlington*, 556 U.S. at 608–09 (citing CERCLA § 107(a), 42 U.S.C. § 9607(a)). The statute uses the terms "vessel" or "facility" in referring to properties subject to potential Superfund liability. *See, e.g.*, CERCLA § 107(a), 42 U.S.C. § 9607(a). For the sake of simplicity, we generally use the term "property" in this article because that term reflects common usage in the context of brownfields issues.

[7] *Burlington*, 556 U.S. at 613 ("Congress intended the scope of liability to be determined from traditional and evolving principles of common law[.]"(quoting United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983)) (internal quotation marks omitted). Until the *Burlington* decision, the Supreme Court had not confronted the issue of joint and several liability in CERCLA cases. In *Burlington*, the Court signaled its approval of the *Chem-Dyne* reasoning by adopting the "reasonable basis" test of the Restatement (Second) of Torts for allocating CERCLA liability for a single harm among multiple responsible parties. *Id.* at 614 (citing RESTATEMENT (SECOND) OF TORTS § 433A(1)(b) (1965)).

[8] *See id.* at 613–14 (citing *In re* Bell Petroleum Servs., Inc., 3 F.3d 889, 901–02 (5th Cir. 1993); United States v. Alcan Alum. Corp., 964 F.2d 252, 268 (3d Cir. 1992); O'Neil v. Picillo, 883 F.2d 176, 178 (1st Cir. 1989); United States v. Monsanto Co., 858 F.2d 160, 171–73 (4th Cir. 1988)). *See also* Lynda J. Oswald, *New Directions in Joint and Several Liability under CERCLA?*, 28 U.C. DAVIS L. REV. 299, 329–34 (1995) (surveying lower court cases and finding that the practical effect of most of these cases "has been blanket application of joint and several liability for CERCLA cleanup costs").

[9] CERCLA § 107(b), 42 U.S.C. § 9607(b); *see infra* text accompanying notes 13–17 (discussing the third party defense and the innocent landowner subset of this defense).

[10] *See* Sarah Fox, *CERCLA, Institutional Controls, and the Legacy of Urban Industrial Use*, 42 ENVTL. L. 1211, 1225–26 (2012) (describing post-1986 increased reluctance to redevelop brownfield properties); *infra* text accompanying note 22 (discussing developer reluctance to acquire and redevelop brownfields properties).

> bill makes it clear that innocent parties will not be held liable under Superfund for the work they do on a brownfield site.[11]

Unfortunately, the language that provides liability relief leaves ambiguities and potential liability traps that could negate the protections that Congress intended. These ambiguities relate to post-acquisition conditions that brownfield purchasers must satisfy to qualify for the liability defenses. In some cases, ambiguities arise because of a lack of defined terms or interpretive case law. In others, application of earlier CERCLA case law could undermine the Brownfields Amendments and perpetuate the liability of innocent brownfield purchasers. These unintended consequences stem, in part, from Congress' decision to adopt the Brownfields Amendments as a package of amendments to CERCLA rather than enacting them as a freestanding statute. Courts may find it difficult to put aside CERCLA's well-developed precedents and view the amended statute in light of the different purpose of its amendments. Whatever the reason, would-be redevelopers face the possibility of harsh liability under CERCLA for misjudging the scope of their obligations.

This uncertainty gives rise to three separate liability defense issues, each of which this article examines in detail. Section II summarizes CERCLA as it bears on the reluctance of investors to acquire and develop brownfield properties and Congress' response with the Brownfields Amendments. Section III evaluates the novel and interrelated requirements that brownfields purchasers "be in compliance with any land use restrictions" and "not impede the integrity of any institutional control." Section IV seeks to reconcile the language in the Brownfields Amendments prohibiting "disposal" of hazardous substances with the arguably inconsistent requirement that an owner take "reasonable steps" to address "releases" of hazardous substances. These competing obligations pit pre-2002 case law that construes certain types of passive migration of contaminants and movement of contaminated soils as "disposal" against the "reasonable steps" obligation of brownfield redevelopers to manage "releases" of hazardous substances. Those "releases" will presumably entail movement of soils or passive migration. This section also provides guideposts for satisfying the obligation to take "reasonable steps" to address "releases" at brownfields sites. Finally, section V suggests a proper interpretation for the "non-affiliation" requirement of the liability defenses.

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[11] 147 CONG. REC. 6241 (2001) (statement of Sen. Boxer).

In addressing these issues, this article examines the statutory text of the Brownfields Amendments, its legislative history, and the few judicial decisions that have interpreted the Brownfields Amendments liability defenses. Recognizing judicial reluctance to depart from CERCLA precedents established prior to the Brownfields Amendments, this article suggests that courts harmonize the interpretations of the liability defenses in a way that strikes the balance intended by Congress. The method suggested would help achieve the goal of creating incentives for restoring brownfield properties to economic productivity without disturbing CERCLA's overall liability scheme.

II. CERCLA AND THE BROWNFIELDS AMENDMENTS OF 2002

Not long after CERCLA's 1980 enactment, the unintended consequences of its broad liability scheme and narrow defenses emerged. For example, even when a previous owner caused the hazardous substance release, the third party defense could not protect a new purchaser from liability. Under the 1980 version of the defense, purchasing the property created a disqualifying contractual relationship between the buyer and seller.[12] This broad construction of the contractual relationship left few, if any, new purchasers eligible for the third party defense.

To overcome this harsh result, Congress amended CERCLA in 1986 to establish a subset of the third party defense which has come to be known as the "innocent landowner" ("ILO") defense.[13] Originally, parties seeking to employ the defense needed to show that they had no contractual relationship with the party who caused the release, "exercised due care with respect to the hazardous substance concerned,"

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[12] *See* United States v. Occidental Chem. Corp., 965 F. Supp. 408, 414 (W.D.N.Y. 1997) (citing United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 558 (W.D.N.Y. 1988)); CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) ("The term 'contractual relationship' for the purpose of [the third party defense] includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession . . . .").

[13] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 101(f), 100 Stat. 1613, 1616 (amending CERCLA § 101(35), 42 U.S.C. § 9601(35)). The adoption of the amendment took the form of a statutory definition of "contractual relationship" in the House-Senate conference committee. According to the conferees:

> This new definition of contractual relationship is intended to clarify and confirm that under limited circumstances landowners who acquire property without knowing of any contamination at the site and without reason to know of any contamination (or as otherwise noted in the amendment) may have a defense to liability under section 107 and therefore should not be held liable for cleaning up the site if such persons satisfy the remaining requirements of section 107(b)(3).

H.R. REP. No. 99-962, at 186 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3279.

and "took precautions against foreseeable acts or omissions of any such third party . . . ."[14] The ILO defense established that a property purchaser who otherwise meets the third party defense is not disqualified solely for having a contractual relationship with the seller. [15] If the purchaser can demonstrate that it acquired the property after the disposal or placement of a hazardous substance on the property and that it had no knowledge or reason to know of the prior disposal, then it may escape liability.[16] For an innocent landowner to establish that it had "no reason to know," it must demonstrate that prior to purchase it conducted "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."[17]

Implementing the "all appropriate inquiry" requirement was not a simple undertaking. At the time, environmental due diligence prior to property acquisition was a relatively novel idea, and there was no consensus regarding what constituted "good commercial or customary practice." CERCLA's 1986 amendments provided standards designed for courts adjudicating the third party defense, not for innocent purchasers.[18] Congress also neglected to delegate rulemaking authority to the U.S. Environmental Protection Agency ("EPA") to prescribe sound due diligence criteria based on those factors. As a result, the private sector stepped forward to develop "good commercial or customary practice" for conducting "all appropriate inquiry." In 1993 the American Society for Testing and Materials—an independent standards setting organization subsequently renamed ASTM International ("ASTM")—published a "Standard Practice for

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[14] CERCLA, Pub. L. No. 96-510, 94 Stat. 2767, 2781-82 (1980) (current version at 42 U.S.C. § 9607(b)(3)).

[15] The 1986 amendments also identified additional classes of innocent landowners. Innocent landowners include a government entity that acquired the facility by involuntary transfer, escheat, or eminent domain. CERCLA § 101(35)(A)(ii), 42 U.S.C. § 9601(35)(A)(ii). Innocent landowners also include parties that acquire property by inheritance. CERCLA § 101(35)(A)(iii), 42 U.S.C. § 9601(35)(A)(iii).

[16] CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i).

[17] CERCLA § 101(35)(B), 100 Stat. 1613, 1616 (1986) (current version at 42 U.S.C. § 9601(35)(B)). The phrase "good commercial or customary practice" was changed to "good commercial *and* customary standards and practices" in the 2002 Brownfields Amendments. CERCLA § 101(35)(B)(i)(I), 42 U.S.C. § 9601(35)(B)(i)(I) (emphasis added).

[18] Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 101(f), 100 Stat. 1613, 1616 (1986) (codified as CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B)) ("[T]he court shall take into account any specialized knowledge or experience on the part of the defendant, the relationship of the purchase price to the value of the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.").

Environmental Site Assessments: Phase I Environmental Site Assessment Process" ("ASTM Phase I Standard Practice") to define good practice for conducting a commercial environmental site assessment.[19] The ASTM Phase I Standard Practice, including subsequent revisions, has achieved wide market acceptance.[20]

Though it intended to relieve innocent purchasers of CERCLA liability fears, the ILO defense failed to resolve the problem posed by the large number of abandoned or under-utilized contaminated properties in urban areas.[21] The commercial real estate industry remained unwilling to acquire and redevelop these properties. Developers were concerned that acquiring and redeveloping brownfields properties, which typically involves movement of contaminated soils within the property as part of the site cleanup, could expose them to joint and several liability for contamination done by previous owners.[22] Intent upon returning these properties to productive use, Congress passed the Brownfields Amendments.[23]

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[19] ASTM, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS E1527-93 (1993). Revisions to this Practice were published in 1997, 2000, 2005 and 2013. The current edition is ASTM, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS E1527-13 (2013) [hereinafter ASTM E1527-13 PHASE I PRACTICE].

[20] *See* Dale A. Guariglia, Michael Ford & Gerald DaRosa, *The Small Business Liability Relief and Brownfields Revitalization Act: Real Relief or Prolonged Pain*, 32 ENVTL. L. REP. 10505, 10507 (2002) (describing the ASTM E1527-97 Standard as the "industry accepted standard for conducting phase I environmental site assessments"); Spencer M. Wiegard, Note, *The Brownfields Act: Providing Relief for the Innocent or New Hurdles to Avoid CERCLA Liability?*, 28 WM. & MARY ENVTL. L. & POL'Y REV. 127, 151 n.129 (2003) ("ASTM has developed widely accepted standards for evaluating environmental liabilities and worked with the EPA to develop standards for Brownfields redevelopment."(quoting RONALD H. ROSENBERG, COMMUNITY RESOURCE GUIDE FOR BROWNFIELDS REDEVELOPMENT 230 (1999))) (internal quotation marks omitted).

[21] S. REP. NO. 107-2, at 1 (2001) ("The U.S. Conference of Mayors and others have estimated that there are more than 450,000 brownfield sites nationwide."); *see id*. at 3 (contrasting the number of sites listed on the National Priorities List (NPL) for Superfund remediation—less than 1500 sites as of 2001—with the vastly greater number of brownfields sites—in excess of 450,000).

[22] Developers faced potential CERCLA liability simply by becoming an owner of a brownfield property. *See, e.g.*, Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 608 (2009) (citing CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1)). In addition, some lower courts had construed certain redevelopment activities, such as moving lightly contaminated soils from one area of the property to another location within the property, as a new disposal and hence an independent basis for CERCLA liability under section 107(a)(2), 42 U.S.C. § 9607(a)(2). *See, e.g.*, Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1512 (11th Cir. 1996) ("[D]isposal may occur when a party disperses contaminated soil during the course of grading and filling a construction site."); PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 177 (4th Cir. 2013), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013) ("[CERCLA's] definition of disposal does not limit disposal to a one-time occurrence—there may be other

A. The Brownfields Amendments

The Brownfields Amendments altered numerous sections of CERCLA[24] to (1) promote brownfields assessment and cleanup through grants and other financial assistance, (2) support state cleanup programs, and (3) expand and clarify protections from CERCLA liability.[25] These Brownfields Amendments were a response to widespread concern that fear of liability had created insurmountable disincentives to cleaning up and revitalizing countless brownfield sites nationwide "that blight our communities, pose health and environmental hazards, erode our cities' tax base, and contribute to urban sprawl and loss of farmland."[26]

Legislative history identified fear of CERCLA liability as a major deterrent to brownfields cleanup and revitalization.[27] Two consistent

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disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings." (quoting Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.3d 1568, 1573 (5th Cir. 1988)); United States v. Honeywell Int'l, Inc., 542 F. Supp. 2d 1188, 1198–99 (E.D. Cal. 2008) (holding the developer liable for disposal of hazardous substances for moving contaminated soils from one area of the property to another in the course of redevelopment work prior to enactment of the Brownfields Amendments). The Congressional debate on the 2002 Brownfields Amendments repeatedly stressed the goal of overcoming these CERCLA disincentives to brownfields redevelopment by protecting innocent purchasers of contaminated properties from CERCLA liability. *See, e.g.*, 147 CONG. REC. 6241 (2001) (statement of Sen. Boxer) ("Our bill makes it clear that innocent parties will not be held liable under Superfund for the work they do on a brownfield site. This provision alone should help reduce the fear of developers and real estate interests and it should lead to more cleanups."); *id.* at 27549 (statement of Rep. Duncan) ("[W]e should be doing everything we can to encourage the redevelopment of these brownfields sites . . . Nothing in this bill should be read to make it easier to bring lawsuits against innocent landowners."). For additional examples of the deterrent effect of the CERCLA program on brownfields redevelopment, see Flannary P. Collins, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL'Y F. 303, 308–12 (2003). *See also* Fox, *supra* note 10 at 1225–26.

[23] Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (codified in scattered sections of 42 U.S.C. §§ 9601–9628).

[24] *Id.* The final bill, H.R. 2869, 107th Cong., 1st Sess., melded S. 350 and H.R. 1831, which had passed unanimously in their respective originating houses earlier in 2001. S. 350 primarily dealt with brownfields issues and became Title II of H.R. 2869. H.R. 1831 became Title I of H.R. 2869 and provided liability relief for small businesses, generators of municipal solid wastes, and small contributors of wastes at Superfund sites. *See* Melissa H. Weresh, *Brownfields Redevelopment and Superfund Reform under the Bush Administration: A Refreshing Bipartisan Accomplishment*, 25 W. NEW ENG. L. REV. 193, 201–02 (2003).

[25] *See* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002); CERCLA § 101(39)(A)–(B), 42 U.S.C. § 9601(39)(A)–(B); S. REP. NO. 107-2, at 1–4 (2001).

[26] S. REP. NO. 107-2, at 1 (2001).

[27] *Id.* at 2 ("The fear of prolonged entanglements in Superfund's liability scheme has been reported by some to be an impediment to the cleanup of even lightly contaminated sites, today known as brownfields . . . [T]he U.S. Conference of Mayors cited high cost and fear of CERCLA liability as the primary factors that prevent the successful redevelopment of brownfields site.");

themes emerged. First, parties that had nothing to do with the contamination at these sites should not be subject to CERCLA liability. Second, the stringent cleanup standards typically required for Superfund sites should not apply to contaminated brownfields sites when innocent parties purchase these properties.[28]

Congress responded to these concerns by establishing financial incentives for assessing and cleaning up brownfields properties,[29] as well as specific exceptions to the CERCLA liability scheme for certain "innocent" purchasers and redevelopers of these properties.[30] Congress further recognized that the states[31] had developed sound, flexible, voluntary cleanup programs and wanted to provide financial incentives for states to establish and maintain such programs.[32] To further support state remedial programs, Congress limited the EPA's enforcement and

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147 CONG. REC. 6227 (2001) (statement of Senate floor manager, Sen. Smith) ("What this [bill] does is it limits the liability and brings us closer to finality in cleanup so we can now get contractors to go on these sites. They can get the insurance, they can take the risk, and they are not going to be held accountable if a hot spot or some other problem that was not their fault occurs several years down the road."); *id.* at 27548 (2001) (statement of House floor manager, Rep. Gillmor) ("Several witnesses testified before our committee that fear of liability kept them from cleaning up brownfields . . . ."). President George W. Bush emphasized this point in his statement upon signing the bill. *See* 38 WEEKLY COMP. PRES. DOC. 52, 53 (Jan. 11, 2002). *See also supra* text accompanying note 22.

28 *See* S. REP. 107-2, at 10 (2001) (The contiguous property owner defense "protects parties that are essentially victims of pollution incidents cause by their neighbor's actions. It is not intended to require parties raising [that defense] . . . to undertake full-scale response actions with respect to migrating contaminated plumes passing through their property."); *id.* at 3 (noting that many of the CERCLA cleanup requirements "intended to address the nation's worst hazardous waste sites . . . are not appropriate in the context of funding for brownfields assessment and remediation."); *id.* at 11 (liability relief for purchasers of contaminated property who demonstrate that they did not contribute to the contamination on the property and satisfy certain other conditions); *id.* at 13–14 (clarifying the conditions for qualifying for the innocent landowner defense); 147 CONG. REC. 6240 (2001) (statement of Sen. Boxer) ("This bill fills a gap. . . . Superfund covers our Nation's most hazardous sites. We really did not have a way to approach the less hazardous sites."); *id.* at 6248 (statement of Sen. Clinton) ("The bill provides appropriate liability relief for innocent parties who want to clean up and reuse brownfield sites, while maintaining the necessary Federal safety net to address serious cleanup issues."); *id.* at 27549 (2001) (statement of Rep. Duncan) ("I agree that we should be doing everything we can to encourage the redevelopment of these brownfields sites. . . . Nothing in this bill should be read to make it easier to bring lawsuits against innocent landowners."); *see also supra* text accompanying note 11.

29 *See* CERCLA § 104(k), 42 U.S.C. § 9604(k).

30 *See* CERCLA §§ 101(35), (40), 107(q), (r), 42 U.S.C. §§ 9601(35), (40), 9607(q), (r).

31 *See* S. REP. 107-2, at 3 (2001) ("Successful State programs have been so largely because of their ability to address larger numbers of sites, and their ability to waive State liability if a cleanup is performed in a manner acceptable to the State.").

32 *See* CERCLA § 128(a), 42 U.S.C. § 9628(a); S. REP. 107-2, at 3 (2001) ("[S]ome States do not have fully developed State programs, and this legislation would provide funding and assistance to help develop these programs.").

listing authority to brownfields sites where cleanup is occurring under such state programs.[33]

Congress understood that it was striking a balance between CERCLA's stringent liability and remedial goals and the promotion of revitalization and cleanup of brownfield sites. Accomplishing the latter called for mitigating the brownfield redevelopment and site cleanup disincentives.[34] Whether the Brownfields Amendments succeed in striking the appropriate balance between these competing statutory goals will initially depend on the EPA's implementation of the Brownfields Amendments as part of its Superfund enforcement program. In particular, Congress understood that the EPA regulation prescribing standards and procedures for the cleanup of Superfund sites, the National Contingency Plan ("NCP"),[35] "was designed to address the nation's worst sites" and that "applying the NCP to brownfield sites is unnecessary and onerous in most cases."[36] Ultimately, however, the federal courts must engage in a careful balancing process to ensure economic development as well as reasonable community protection from environmental harms. This will require the courts to recognize that

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[33] *See* CERCLA § 128(b), 42 U.S.C. § 9628(b) (limiting EPA's authority to pursue CERCLA administrative or judicial remedies); *id*. § 105(h), 42 U.S.C. § 9605(h) (directing deferral of NPL listing of a brownfield site undergoing remediation under a state response program). Congress also recognized that the existing EPA loan programs for remediating brownfields sites in disadvantaged communities were unable to achieve their remedial goals because buyers in these low-income communities were often unable to repay such loans. To facilitate cleanup and restoration of these properties, Congress authorized direct grants to such communities under certain circumstances. *See* S. REP. 107-2, at 7 (2001).

[34] *See, e.g.*, 147 CONG. REC. 6248 (2001) (Statement of Sen. Clinton) ("This bill strikes a delicate balance. There are compromises and tradeoffs."); *id.* at 6240 (statement of Sen. Chafee) (describing the bill as "balanc[ing] the needs of the environment and the economy"); *id.* at 6239 (statement of Sen. Reid) (describing the bill as "delicate[ly] balance[d]"); *id.* at 27549 (statement of Rep. Pallone) ("I believe the role of the Federal Government is to strike a balance between the desire to provide redevelopment incentives that will work for a variety of sites, while at the same time maintaining the assurance to affected citizens that these sites will no longer threaten the health of the community."). The Senate Environment and Public Works Committee described the bill's aim as "provid[ing] a balance of certainty for prospective purchasers, developers and others while ensuring protection of the public health." S. REP. NO. 107-2, at 4 (2001).

[35] The National Oil and Hazardous Substances Pollution Contingency Plan (commonly known as the National Contingency Plan or NCP) is an EPA regulation (40 C.F.R. § 300 (2014)) required by CERCLA § 105, 42 U.S.C. § 9605, and the Clean Water Act § 311(d), 33 U.S.C. § 1321(d), that "provide[s] the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants" under CERCLA and the Clean Water Act. 40 C.F.R. §§ 300.1–300.2 (2014).

[36] S. REP. NO. 107-2, at 8 (2001); *see also id.* at 3 ("Because the NCP is intended to address the nation's worst hazardous waste sites, many of its requirements are not appropriate in the context of funding for brownfields assessment and remediation. Further, its application to the brownfield grant program process has proven cumbersome and has become a significant barrier to greater participation in the program.").

the Brownfields Amendments represent a departure from the legislative purpose underlying the pre-2002 CERCLA liability scheme.[37] The challenge facing the courts will be to revisit existing CERCLA case law to ensure that the impediments to brownfield redevelopment that plagued the CERCLA program prior to 2002 do not continue to thwart community revitalization.

B. The Landowner Liability Defenses

The Brownfields Amendments clarified the ILO defense that was enacted in 1986[38] and added two new categories of property owners potentially eligible for CERCLA liability protection: contiguous property owners ("CPOs")[39] and bona fide prospective purchasers ("BFPPs").[40] Congress explicitly assigned the burden of demonstrating eligibility for each of the defenses to the party asserting the defense under a preponderance of the evidence standard.[41]

1. The Revised Innocent Landowner Defense

Previously, the person seeking to qualify as an innocent landowner needed to conduct "all appropriate inquiry" into the previous ownership and uses of the property prior to acquisition, as well as demonstrate that it had no knowledge or reason to know of a prior disposal of hazardous substances on the property.[42] The revised ILO defense changed this standard in two important ways. First, the 2002 amendments provide that the vague "all appropriate inquiry" requirements be governed by standards and practices defined in EPA regulations in accordance with ten statutory criteria.[43] Second, the 2002 Amendments require the ILO

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[37] *See, e.g.*, Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81, 94 (2002) ("Courts and agencies must give effect to these sorts of compromises."); East Bay Mun. Util. Dist. v. Dep't of Commerce, 142 F.3d 479, 484 (D.C. Cir. 1998) (noting that statutes are not "unidirectional" in purpose, and that they "reflect a legislative balancing of competing purposes"); Davis County Solid Waste Mgmt. & Energy Recovery Special Servs. Dist. v. EPA, 101 F.3d 1395, 1409 (D.C. Cir. 1996) (recognizing that legislation may "represent a compromise between competing concerns and purposes.").

[38] *See* CERCLA § 101(35), 42 U.S.C. § 9601(35).

[39] *See* CERCLA § 107(q), 42 U.S.C. § 9607(q).

[40] *See* CERCLA § 101(40), 42 U.S.C. § 9601(40).

[41] *See* CERCLA §§ 101(35)(A), 101(40), 107(q)(1)(B), 42 U.S.C. §§ 9601(35)(A), 9601(40), 9607(q)(1)(B).

[42] CERCLA § 101(35)(B), 100 Stat. 1613, 1616 (1986) (current version at 42 U.S.C. § 9601(35)(B)).

[43] CERCLA § 101(35)(B)(ii), (iii), 42 U.S.C. § 9601(35)(B)(ii), (iii). That regulation was promulgated on November 1, 2005, and became effective on November 1, 2006. 70 Fed. Reg. 66,070 (codified at 40 C.F.R. §§ 312.1–312.31 (2014)). The statute also provided as an interim measure that prior to promulgating the EPA rule and until it became effective, the ASTM Phase I

to show it fulfilled enumerated "continuing obligations" after acquiring the property.[44] Additionally, ILOs who acquire actual knowledge of contamination have a duty to disclose its existence to the subsequent purchaser of the property.[45]

2. The Contiguous Property Owner Defense

The CPO defense was modeled after a 1995 EPA policy statement under which the EPA would not hold a property owner liable for contaminated groundwater from off-site sources if the CPO did not contribute to the release of the hazardous substances, did not have a contractual relationship with the person responsible for the release of the hazardous substances, and was not otherwise a potentially liable party.[46] Under the Brownfields Amendments, a CPO contaminated by a hazardous substance migrating from off-site sources will not be deemed an owner or operator of a contaminated site for purposes of Superfund liability if the following conditions have been met:

- At the time of property acquisition, the CPO had conducted all appropriate inquiry[47] and did not know or have any reason to know that the property was or could be contaminated by a release from the adjoining property;[48]
- The CPO did not cause, contribute or consent to the hazardous substance release;[49]
- The CPO is not potentially liable and qualifies as being "non-affiliated"[50] with the off-site source owner; and

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practice published in 1997 would define "all appropriate inquiry" for any property acquisition since May 31, 1997. CERCLA § 101(35)(B)(iii)(II), 42 U.S.C. § 9601(35)(B)(iii)(II). EPA subsequently added the 2000 version of the ASTM Phase I practice as an acceptable interim standard for "all appropriate inquiry." 68 Fed. Reg. 24,888 (May 9, 2003).

44 *See infra* text accompanying notes 67–75 (describing continuing obligations).

45 CERCLA § 101(35)(C), 42 U.S.C. § 9601(35)(C).

46 *See* S. REP. 107-2, at 9–10 (2001), citing EPA, FINAL POLICY TOWARD OWNERS OF PROPERTY WITH CONTAMINATED AQUIFERS, Memorandum dated May 24, 1995, *reprinted in* 60 Fed. Reg. 34,790 (July 3, 1995) [hereinafter EPA, AQUIFER POLICY].

47 CERCLA § 107(q)(1)(A)(viii)(I), 42 U.S.C. § 9607(q)(1)(A)(viii)(I) (cross-referencing CERCLA § 101(35)(B), 42 U.S.C. § 9601(35)(B)).

48 CERCLA § 107(q)(1)(A)(q)(1)(A)(viii)(II), 42 U.S.C. § 9607(q)(1)(A)(q)(1)(A)(viii)(II). Congress specifically protected the contiguous property owner from a requirement to conduct a groundwater investigation or to install a groundwater remediation system to address contaminated groundwater migrating from an off-site source except as authorized in the 1995 EPA policy statement. *See* CERCLA § 107(q)(1)(D), 42 U.S.C. § 9607(q)(1)(D) (citing EPA, AQUIFER POLICY, *supra* note 46).

49 CERCLA § 107(q)(1)(A)(i), 42 U.S.C. § 9607(q)(1)(A)(i).

- The CPO fulfilled enumerated "continuing obligations."[51]

3. The Bona Fide Prospective Purchaser Defense

The third—and likely most important—of the three defenses in the Brownfields Amendments is the BFPP defense. To qualify as a BFPP, the property owner must have purchased the property after January 11, 2002,[52] made all appropriate inquiry into the prior ownership and uses of the property before acquiring the property, [53] satisfied the enumerated "continuing obligations," [54] and not be affiliated with a potentially responsible party.[55] Further, all disposals of hazardous substances must have occurred prior to the purchase.[56]

What gives the BFPP defense added importance is that, unlike the ILO[57] and CPO[58] defenses, the BFPP remains eligible for the defense even if the purchaser knew or should have known of a release or threatened release of hazardous substances on the property.[59] In fact, a party may become aware of contamination on the property as a result of the due diligence requirement, rendering it ineligible for both the ILO or CPO defenses, but will remain eligible for the BFPP defense.[60] It therefore appears likely that the BFPP defense will become the most utilized CERCLA liability defense.

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[50] CERCLA § 107(q)(1)(ii)(I), 42 U.S.C. § 9607(q)(1)(ii)(I); *see* CERCLA §§ 101(35)(A), (D), (40)(H), 107(b)(3), (q)(1)(A)(ii), 42 U.S.C. §§ 9601(35)(A), (D), (40)(H), 9607(b)(3), (q)(1)(A)(ii); *infra* section V (discussing the non-affiliation requirement).

[51] CERCLA § 107(q)(1)(ii)–(vii), 42 U.S.C. § 9607(q)(1)(ii)–(vii); *see infra* text accompanying notes 67–75 (describing continuing obligations).

[52] CERCLA § 101(40), 42 U.S.C. § 9601(40).

[53] CERCLA § 101(40)(B)(i)–(ii), 42 U.S.C. § 9601(40)(B)(i)–(ii). In the case of residential property, "all appropriate inquiry" would be satisfied by a facility inspection and a title search that reveals no basis for further investigation. CERCLA § 101(4)(B)(iii), 42 U.S.C. § 9601(40)(B)(iii).

[54] CERCLA § 101(40)(C)–(G), 42 U.S.C. § 9601(40)(C)–(G); *see infra* text accompanying notes 67–75 (describing continuing obligations).

[55] CERCLA § 101(40)(H), 42 U.S.C. § 9601(40)(H); *see* CERCLA §§ 101(35)(A), (D), (40)(H), 107(b)(3), (q)(1)(A)(ii), 42 U.S.C. §§ 9601(35)(A), (D), (40)(H), 9607(b)(3), (q)(1)(A)(ii); *infra* section V (discussing the non-affiliation requirement). In addition, to prevent a BFPP from profiting at the expense of the government, the Brownfields Amendments authorized the United States government to place a "windfall lien" on the BFPP's property (or by agreement on some other property owned by that purchaser) if the United States has unrecovered response costs at the BFPP's property and if the response action increased the fair market value of that property. CERCLA § 107(r)(2)–(3), 42 U.S.C. § 9607(r)(2)–(3).

[56] CERCLA § 101(40)(A), 42 U.S.C. § 9601(40)(A). This defense is also available to the property owner's tenant. CERCLA § 101(40), 42 U.S.C. § 9601(40).

[57] CERCLA § 101(35)(A)(i), 42 U.S.C. § 9601(35)(A)(i).

[58] CERCLA § 107(q)(A)(viii)(II), 42 U.S.C. § 9607(q)(A)(viii)(II).

[59] CERCLA § 107(q)(1)(C), 42 U.S.C. § 9607(q)(1)(C).

[60] Congress included language in the CPO section to confirm that interpretation. *See id.*

C. Pre-Acquisition Obligations

Brownfields purchasers seeking to establish and maintain eligibility for one or more of the CERCLA defenses in the Brownfields Amendments have both pre- and post-acquisition obligations. The primary pre-acquisition obligation, or "threshold criteria,"[61] is conducting "all appropriate inquiry" ("AAI").[62]

Congress delegated rulemaking authority to the EPA and spelled out the criteria that an AAI rule should address in defining the due diligence standards and practices for conducting "all appropriate inquiry" into the prior ownership and uses of the property.[63] The EPA completed that rulemaking in 2005.[64] Due to the widespread use and experience with the ASTM Phase I Practice,[65] the EPA's rule provided that the due diligence requirements could be satisfied either by compliance with its "all appropriate inquiries" rule, the ASTM Phase I Practice, or a related Phase I Practice for forestland or rural property.[66]

D. Post-Acquisition Continuing Obligations

Qualifying for the Brownfield Amendment's liability defenses requires compliance with multiple post-purchase statutory conditions

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[61] *See* EPA, INTERIM GUIDANCE REGARDING CRITERIA LANDOWNERS MUST MEET IN ORDER TO QUALIFY FOR BONA FIDE PROSPECTIVE PURCHASER, CONTIGUOUS PROPERTY OWNERS, OR INNOCENT LANDOWNER LIMITATIONS ON CERCLA LIABILITY at 2 (Mar. 6, 2003) [hereinafter EPA, COMMON ELEMENTS GUIDANCE], *available at* http://www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf.

[62] EPA describes the non-affiliation requirement as one of the threshold criteria. *See id.* at 4–6, As a practical matter, it is both a pre-acquisition and post-acquisition continuing obligation. Because a prohibited affiliation is often likely to arise in the context of the property acquisition at issue in the claimed liability defense, we address the requirement among the continuing obligations. *See infra* section V.

[63] *See supra* text accompanying note 43, 53.

[64] 70 Fed. Reg. 66,070 (Nov. 1, 2005) (codified at 40 C.F.R. § 312.1–312.31 (2014)).

[65] ASTM, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENTS: PHASE I ENVIRONMENTAL SITE ASSESSMENT PROCESS E1527-05 (2005) [hereinafter ASTM PHASE I PRACTICE E1527-05]. As noted earlier, ASTM published an updated version of the Phase I Practice in 2013; *see* ASTM PHASE I PRACTICE E1527-13, *supra* note 19.

[66] *See* 40 C.F.R. § 312.11 (2014), referencing ASTM E1527-05 PHASE I PRACTICE, E1527-13 and ASTM, STANDARD PRACTICE FOR ENVIRONMENTAL SITE ASSESSMENT PROCESS FOR FORESTLAND OR RURAL PROPERTY E2247-08 (2008); *see also* 70 Fed. Reg. at 66,106 ("The Agency has determined that this voluntary consensus standard [ASTM PHASE I PRACTICE E1527-05] is consistent with today's final rule and is compliant with the statutory criteria for all appropriate inquiries."); 78 Fed. Reg. 79319, 79320 (Dec. 30, 2013) (EPA finding that the "ASTM E1527-13 standard is compliant with the All Appropriate Inquiries Rule."). EPA subsequently removed the reference to E1527-05 because the 2013 standard has replaced the 2005 standard and is ASTM's "currently recognized industry consensus-based standard to conduct all appropriate inquiries . . . under CERCLA." 79 Fed. Reg. 60087 (Oct. 6, 2014).

that apply once the new owner acquires title to the property. These conditions are known as "continuing obligations."[67] Compared to AAI, continuing obligations are less understood, less judicially tested, and there is little practical experience with the actual steps needed to meet the requirements.

All of the continuing obligations must be met in order to successfully assert any of the liability defenses,[68] and with minimal variance each liability defense shares the same "continuing obligation" requirements:

- No disposing of hazardous substances at the property after acquiring title;[69]
- Complying with "any land use restrictions established or relied on in connection with [a] response action" at the property and "not imped[ing] the effectiveness or integrity of any institutional control employed at the [property] in connection with a response action;"[70]
- Exercising "appropriate care with respect to hazardous substances found at the [property] by taking reasonable steps ... to stop any continuing release; ... prevent any threatened future release; and ... prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance;"[71]

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[67] The phrase does not appear in the Brownfields Amendments but was coined by EPA shortly after their enactment. *See* EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 2. EPA used the same terminology in the preamble to the final all appropriate inquiries rule. 70 Fed. Reg. 66070, 66072-74 (Nov. 1, 2005).

[68] PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 181 (4th Cir.), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013) ("a party must establish all eight factors ... to qualify for a[n] ... exemption from liability").

[69] CERCLA §§ 101(35)(A), (40)(A), 42 U.S.C. § 9601(35)(A), (40)(A). This provision applies to the innocent landowner and the bona fide prospective purchaser. There is no comparable provision for the contiguous property owner, but that party loses eligibility for the defense if he caused, contributed or consented to the release or threatened release, a difficult evidentiary burden if the party disposed of hazardous substances on the property. *Id.* § 107(q)(A)(i), 42 U.S.C. § 9607(q)(A)(i).

[70] CERCLA §§ 101(35)(A), (40)(F), 107(q)(1)(A)(v), 42 U.S.C. § 9601(35)(A), (40)(F), 9607(q)(1)(A)(v).

[71] CERCLA §§ 101(35)(B)(i)(II), (40)(D), 107(q)(1)(A)(iii), 42 U.S.C. § 9601(35)(B)(i)(II), (40)(D), 9607(q)(1)(A)(iii). In addition to taking reasonable steps, the ILO must demonstrate that 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 . . . ." *Id.* § 107(b)(3), 42 U.S.C, § 9607(b)(3).

- Providing "full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restoration" at a property;[72]
- Complying with information requests and subpoenas issued under CERCLA;[73]
- Providing "all legally required notices with respect to the discovery or release of any hazardous substances at the [property];[74] and
- Not being otherwise potentially liable for response costs at the property or being affiliated with another potentially liable person through a familial, contractual, corporate, or financial relationship, other than a relationship created by the

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[72] CERCLA §§ 101(35)(A), (40)(E), 107(q)(1)(A)(iv), 42 U.S.C. §§ 9601(35)(A), (40)(E), 9607(q)(1)(A)(iv). There is a separate obligation applicable to the BFPP "not [to] impede the performance of a response action or natural resource restoration." *Id.* § 107(r)(1), 42 U.S.C. § 9607(r)(1).

[73] CERCLA §§ 101(40)(G), 107(q)(1)(A)(vi), 42 U.S.C. §§ 9601(40)(G), 9607(q)(1)(A)(vi). There is no comparable provision in the statute for the ILO, although EPA guidance implies that this obligation is applicable to the ILO because CERCLA requires compliance with subpoenas and information requests from all persons. EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at Attachment A. To be sure, it is a truism that valid CERCLA subpoenas and information requests require compliance by all persons, subject to the legal sanctions prescribed in the statute for noncompliance (CERCLA § 104(e)(5)(B), 42 U.S.C. § 9604(e)(5)(B); *see, e.g.*, United States v. Gurley, 235 F. Supp. 2d 797, 803 (W.D. Tenn. 2002); United States v. Ponderosa Fibres of America, Inc., 178 F. Supp. 2d 157, 160–61 (N.D.N.Y. 2001), but did Congress also make such compliance by the ILO a condition for maintaining eligibility for a CERCLA liability defense? The statute and the legislative history do not contain any language tying the ILO's eligibility for the defense to compliance with CERCLA subpoenas and information requests. Courts are typically reluctant to add penalties for noncompliance beyond what Congress has specified in the statute. *See, e.g.*, Meghrig v. KFC Western, Inc., 516 U.S. 479, 487–88 (1996) ("[W]here Congress has provided elaborate provisions for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . . . [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." (quoting Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14, (1981)) (internal quotation marks omitted); *cf.* United States v. Bormes, 568 U.S. ___, 133 S. Ct. 12, 19 (2012) ("Where a specific statutory scheme provides the accoutrements of a judicial action, the metes and bounds of the liability Congress intended to create can only be divined from the text of the statute itself.") (footnote omitted); City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005) ("[T]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." (quoting Alexander v. Sandoval, 532 U.S. 275, 290 (2001))).

[74] CERCLA §§ 101(40)(C), 107(q)(1)(A)(vii), 42 U.S.C. §§ 9601(40)(C), 9607(q)(1)(A)(vii). There is no comparable provision in the statute for the ILO, although EPA guidance indicates that notice obligations may be applicable to the ILO under federal, state and local laws. EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at Attachment A.

> instrument transferring title to—or financing—the property or by a sales contract for goods and services.[75]

As discussed below, several of these continuing obligations are ambiguous and potentially confusing. Unlike the AAI rulemaking authorization, there is no statutory provision for EPA rulemaking authority to clarify the post-acquisition continuing obligations.[76] The absence of an EPA rule puts innocent property owners at risk of losing eligibility for a CERCLA liability defense if they incorrectly guess what Congress may have intended in each continuing obligation.

ASTM has again stepped forward to fill the gap. With EPA staff actively involved in the collaborative effort, [77] ASTM created a consensus standard guide to facilitate a property owner's identification and implementation of continuing obligations.[78] The ASTM continuing obligations task group, which developed the guide, consisted of environmental professionals, engineers, attorneys, industrial company representatives, developers, general citizens, and state and federal government representatives (including EPA representatives). The guide describes each of the CERCLA liability defenses and the eligibility conditions,[79] identifies the interpretative issues stemming from ambiguities in the statute,[80] and sets forth a four-step process for determining whether continuing obligations attach in a given

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[75] CERCLA §§ 101(35)(A), (D), (40)(H), 107(b)(3), (q)(1)(A)(ii), 42 U.S.C. §§ 9601(35)(A), (D), (40)(H), 9607(b)(3), (q)(1)(A)(ii).

[76] EPA has made no claim of authority to issue regulations covering continuing obligations. However, EPA did issue nonbinding guidance in 2003 that provided EPA's preliminary interpretation of some of the continuing obligations. *See* EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61. We discuss the positions EPA advanced in the Guidance in the context of particular continuing obligations. *See infra* section III.D; EPA, COMMON ELEMENTS GUIDANCE *supra* note 61 at Attachment B, 2–4.

[77] Upon completion of the standard development process, the Director of EPA's Office of Brownfields and Land Revitalization wrote to the ASTM task group chair congratulating the task group on the successful outcome of the negotiation and noting that EPA "was very involved in the collaborative effort" that produced the guide. EPA expressed the hope that the guide "will assist prospective purchasers of brownfields and other contaminated properties as they contemplate their purchasing decisions and in their efforts to safely manage contaminated properties after purchase." Letter from David R. Lloyd, Dir., EPA Office of Brownfields and Land Revitalization, to Bob Wenzlau, chair of ASTM Task Group on Continuing Obligations (Aug. 1, 2011) (on file with Virginia Environmental Law Journal).

[78] ASTM, STANDARD GUIDE FOR IDENTIFYING AND COMPLYING WITH CONTINUING OBLIGATIONS E2790-11 (2011) [hereinafter ASTM CONTINUING OBLIGATIONS GUIDE E2790-11].

[79] *Id.* §§ 4.2.4.1–4.2.4.2, app. X1.3, at 10, 24–27.

[80] *Id.* app. X1.5–X1.8, at 28–36.

circumstance and, if so, what actions may be taken to satisfy these continuing obligations.[81]

Although more than a decade has elapsed since the Brownfields Amendments became law, there are only a small number of reported cases in which one or more parties asserted a CERCLA landowner liability defense. The courts rejected the defense in two cases (one was an interim rejection at the summary judgment stage),[82] while the court in a third case upheld the defense.[83] In other cases, courts summarily rejected the defense because the continuing obligations were either not pled or not proved (suggesting a lingering lack of awareness on the part of property purchasers).[84] However, one decision was reversed on appeal to give the defendant an opportunity to cure both procedural and substantive deficiencies.[85]

These cases highlight some of the ambiguities that face brownfield purchasers once they acquire property. First, as discussed in Section II of this article, what did Congress mean when it prescribed the continuing obligation to be "in compliance with any land use restrictions established or relied on in connection with the response action" at the property?[86] Some land use restrictions established as part of a site remediation bind only the property owner and do not apply to future owners. Other restrictions, typically subject to deed recordation requirements, easements, or zoning ordinances, run with the land and bind future owners. Did Congress intend that innocent purchasers must comply with land use restrictions that, absent the Brownfields Amendments, would not otherwise apply to them?

Second, as discussed in Section III, what did Congress mean when it stated that all disposal of hazardous substances had to have occurred at the property prior to the innocent purchaser taking title to the

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[81] *Id.* §§ 5–9, at 11–23. The Guide illustrates the four step process in a flow chart. *Id.* at 5.

[82] PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 179–81 (4th Cir. 2013), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013) (upholding trial court rejection of defenses asserted by several parties in multi-party litigation); Saline River Properties, LLC v. Johnson Controls, Inc., 823 F. Supp. 2d 670, 685–87 (E.D. Mich. 2011) (denying summary judgment to party asserting defense—issue to be adjudicated at trial).

[83] 3000 E. Imperial, LLC v. Robertshaw Controls Co., No. CV 08-3985 PA, 2010 WL 5464296, at 11–12 (C.D. Cal. 2010) (upholding claim of bona fide prospective purchaser status).

[84] *See* AMCAL Multi-Housing, Inc. v. Pac. Clay Prods., 457 F. Supp. 2d 1016, 1029 (C.D. Cal. 2006) (Allegations fail to address BFPP elements.); Voggenthaler v. Md. Square, LLC, No. 2:08-cv-1618, 2012 U.S. Dist. LEXIS 69395, 24 (D. Nev. May 17, 2012) (defendant presented no evidence of satisfying BFPP elements in motion for summary judgment).

[85] Voggenthaler v. Md. Square, LLC, 724 F.3d 1050, 1062–63 (9th Cir. 2013).

[86] *See* CERCLA §§ 101(35)(A), (40)(F), 42 U.S.C §§ 9601(35)(A), (40)(F).

property?[87] Does moving around contaminated soils on the property during construction activity constitute "disposal," as some courts held before 2002?[88] If so, can the brownfield redeveloper be assured that management of contaminated soils consistent with "appropriate care" standards will not then be construed as a disqualifying "disposal?" The same uncertainty arises regarding pre-2002 cases that construe passive migration as "disposal."[89]

Third, Section IV discusses the non-affiliation condition. This condition dates back to the original enactment of CERCLA and has a long history of unintended consequences, which has led to repeated attempts by Congress, the EPA, and the courts to limit its scope.[90] One court recently disqualified an innocent purchaser of a property who, as part of the purchase agreement, agreed to indemnify the seller in the event the seller is subjected to future Superfund liability. The EPA subsequently issued guidance announcing that it would not exercise its enforcement authority to disqualify a party from BFPP status for agreeing to such a hold harmless provision.[91]

In the following three sections, we focus on these liability defenses and propose interpretive solutions consistent with the statutory text and the congressional aim of striking a balance between incentives for brownfields restorations and protecting the environment.[92]

III. Compliance with any Land Use Restrictions and Not Impeding the Effectiveness or Integrity of any Institutional Control

Persons seeking to qualify for any of the Brownfields Amendments' liability defenses must show that they are "in compliance with any land use restrictions established or relied on in connection with the response action" at the property[93] and that they did "not impede the effectiveness or integrity of any institutional control employed at the [property] in

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87 *See* CERCLA § 101(40)(A), 42 U.S.C § 9601(40)(A).

88 *See supra* text accompanying note 22.

89 *See infra* section IV.A.1 (discussing passive migration cases).

90 *See* CERCLA §101(35)(A), 42 U.S.C §9601(35)(A); United States v. Occidental Chem. Corp., 965 F. Supp. 408, 414 (W.D.N.Y. 1997) (citing United States v. Hooker Chems. & Plastics Corp., 680 F. Supp. 546, 558 (W.D.N.Y. 1988)); H.R. CONF. REP. No. 99-962, at 186 (1986), reprinted in 1986 U.S.C.C.A.N. 3276, 3279; EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 5.

91 *See* EPA, *infra* notes 510-11.

92 While there are other continuing obligations in addition to those focused on in this article, *see supra* section II.D, the continuing obligations addressed here raise the most perplexing legal issues.

93 CERCLA §§ 101(35)(A), (40)(F)(i), 107(q)(1)(A)(v)(I), 42 U.S.C §§ 9601(35)(A), (40)(F)(i), 9607(q)(1)(A)(v)(I).

connection with a response action."[94] Failure to satisfy these continuing obligations could cause brownfield purchasers to forfeit their CERCLA defenses. Neither "land use restrictions" nor "institutional controls" is defined in CERCLA, including the Brownfields Amendments.[95] The profound consequences of losing eligibility for the CERCLA defenses underscores the importance of a proper interpretation of these terms. This is particularly true for the term "land use restrictions" because the statutory language requires the landowner to *comply* rather than simply "not impede" as with institutional controls.

A. The Statutory Language Provides No Clear Meaning of the Term "Land Use Restrictions"

Congress's failure to define the term "land use restrictions" in the Brownfields Amendments raises the important question of the intended breadth of the term. Specifically, did Congress intend "land use restrictions" to cover only legally binding institutional controls, to be read broadly to also cover non-binding controls, or to be read even more broadly to cover contemplated but not implemented institutional controls?[96] The companion "institutional control" language also lacks statutory definition.[97] However, as we show below, the term "institutional control" acquired a specialized meaning in the context of CERCLA site remediations, and this specialized meaning informs how the companion "land use restrictions" term should be interpreted.[98] This is particularly important because, when considered alone, neither the ordinary meaning nor the legislative history conclusively defines "land use restrictions."

In the absence of a statutory definition, courts typically look to the words' ordinary meaning for guidance.[99] In common usage, the ordinary

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[94] CERCLA §§ 101(35)(A), (40)(F)(ii), 107(q)(1)(A)(v)(II), 42 U.S.C §§ 9601(35)(A), (40)(F)(ii), 9607(q)(1)(A)(v)(II).

[95] *See* CERCLA § 101, 42 U.S.C § 9601.

[96] *See infra* section III.B.

[97] *See* CERCLA § 101, 42 U.S.C § 9601; *infra* section III.B; *see also* 42 U.S.C. § 9621(d)(2)(B)(ii)(III); EPA, IC 2000 GUIDANCE *infra* note 112.

[98] The significance of the term "institutional controls" and its relevance to "land use restrictions" will become clearer when we analyze the administrative usage of the terms and their juxtaposition in the statute. *See infra* sections III.B–C.

[99] *See, e.g.*, Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 610–11 (2009) (Because CERCLA does not specifically define term at issue, the Court gives the term its ordinary meaning); S.D. Warren Co. v. Me. Bd. of Envtl. Prot., 547 U.S. 370, 376 (2006) (absent a statutory definition or a term of art, Court gives term its "ordinary or natural meaning"); *see also* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.7, at 309 (7th ed. 2007) [hereinafter 2A SINGER & SINGER].

meaning of "land use restrictions" refers to limitations on the use and enjoyment of a parcel of property.[100] However, this is of little help because the meaning and breadth of the key term "restrictions" remains unclear. The legislative history is equally unhelpful in shedding light on the scope of both terms, as it does little more than parrot the statutory language, and provides only a few examples of the types of institutional controls whose effectiveness and integrity may not be impeded, such as damaging a cap or removing signs or fences.[101]

Reading the statutory phrase "land use restrictions" in context fails to resolve the ambiguity.[102] While the phrase is preceded in the statute by the word "any," which typically signals interpretive breadth,[103] Congress limited the breadth of the term to encompass only those restrictions "established or relied on in connection with a response action" at the property.[104] While somewhat helpful in narrowing the possible interpretations of the term to mean restrictions associated with site remediation, the contextual reading still does not identify what Congress meant by "restrictions."

Though the statute is unclear, there are several plausible constructions for the term "land use restrictions." A more narrow interpretation applies the term to cover only legally binding restrictions, meaning restrictions embodied in legal instruments. Such instruments include any environmental covenants, government statutes, and

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100 *See* BLACK'S LAW DICTIONARY 958, 1429 (9th ed. 2009) (Although "land use restriction" is not defined, "land-use regulation" is defined as an "ordinance or other legislative enactment governing the development or use of real estate. "Restriction" is defined as a "limitation (esp. in a deed) placed on the use or enjoyment of property.").

101 The Senate Committee where this provision originated stated that "the prospective purchaser must comply with any land use restriction at the site and must not impede the effectiveness or integrity of any institutional control employed at the facility (such as damaging a cap, removing signs or fences, or otherwise failing to maintain an institutional control, etc.)." S. REP. NO. 107-2, at 12 (2001). Similarly, it described the contiguous property owner's obligation in language virtually identical to the statutory text. *Id.* at 10. The Committee's description of the innocent landowner's obligation omits any reference to compliance with any land use restrictions (though it appears in the statute) and references only the second part of that obligation of not impeding the effectiveness or integrity of institutional controls at the property. *Id.* at 13.

102 The significance of the term "institutional controls" and its relevance to "land use restrictions" will become clearer when we analyze the administrative usage of the terms and their juxtaposition in the statute. *See infra* sections III.B–C.

103 *See, e.g.*, Boyle v. United States, 556 U.S. 938, 944 (2009) ("The term 'any' ensures that the definition has a wide reach"); Iraq v. Beaty, 556 U.S. 848, 856 (2009) ("Of course the word 'any' (in the phrase 'any other provision of law') has an 'expansive meaning….' (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)); Kasten v. Saint-Gobain Perf. Plastics Corp., 563 U.S. 1, 10 (2011) ("'*any* complaint' suggests a broad interpretation"). *But see infra* text accompanying note 107.

104 *See* CERCLA § 101(40)(F)(i), 42 U.S.C § 9601(40)(F)(i).

government regulations that legally bind the defense seeker under existing law.[105] A second, broader interpretation reasons instead that "land use restrictions" should not be limited to restrictions that legally bind the defense seeker. Rather, "land use restrictions" include restrictions relied on by a cleanup response action, regardless of whether the restrictions would bind the defense seeker under existing law. This broad interpretation could go even further and include future land use restrictions that were contemplated as part of a response action, but never formally implemented as an institutional control.[106]

Supporters of the broad reading of "land use restrictions" reason that their interpretation is more faithful to the plain meaning of the statutory language, pointing specifically to the expansive statutory term "any."[107] Further, supporters claim that the broad reading makes policy sense. It establishes a *quid pro quo*, under which the new owner escapes harsh CERCLA liability in return for guaranteeing adherence to any restrictions on expectations for future use that were contemplated as part

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[105] ASTM CONTINUING OBLIGATIONS GUIDE E2790-11, *supra* note 78, app. X1.7.3.2, at 33 ("adherents to this 'narrow' interpretation of the statutory language assert that a land use restriction must actually bind the property owner seeking the [CERCLA liability defense] to do or to refrain from doing certain actions on its property in the same manner that the party would have been bound absent the opportunity provided by the Brownfields Amendments to qualify for [a liability defense]") (italics omitted).

[106] *Id.*; *see also infra* section III.B (discussing non-implemented institutional controls); *infra* section III.D (discussing a broad interpretation of "land use restrictions" as including non-implemented institutional controls).

[107] *See supra* text accompanying note 103. Although both sides of this interpretive debate rely on the plain meaning of "land use restrictions," the proponents of the broad meaning arguably overlook the ease with which courts adopt limiting constructions to statutes that use expansive terminology such as "any" and every" to avoid extreme linguistic possibilities. The classic example of such a limiting construction is the "rule of reason" applied to the Sherman Antitrust Act despite statutory language that makes "*[e]very* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . illegal." Standard Oil Co. v. United States, 221 U.S. 1, 59–66 (1911) (construing Sherman Act § 1, 15 U.S.C. § 1) (emphasis added). The Supreme Court continues to follow this principle. *See, e.g.*, Maracich v. Spears, 570 U.S. ___, 133 S. Ct. 2191, 2200 (2013) (applying expansive term without a limiting principle would undermine the structure and purpose of statute); *id.* ("Unless commanded by the text, . . . [expansive terms] ought not operate to the farthest reach of their linguistic possibilities if that result would contravene the statutory design."); Small v. United States, 544 U.S. 385, 388 (2005) ("General words, such as the word 'any' must be limited in their application to those objects to which the legislature intended to apply them" (quoting United States v. Palmer, 16 U.S. (3 Wheat.) 610, 631 (1818) (Marshall, C.J.)) (some internal quotation marks omitted); Util. Air Reg. Grp. v. EPA, 573 U.S. ___, 134 S. Ct. 2427, 2452 (2014) (Breyer, J., concurring in part and dissenting in part) ("The law has long recognized that terms such as 'any' admit of unwritten limitations and exceptions."). A leading statutory interpretation treatise observes that "any" has been "employed to indicate 'all' or 'every' as well as 'some' or 'one' and its meaning in a given statute depends upon the context and the subject matter of the statute." 2A SINGER & SINGER, *supra* note 99, § 47.7, at 310 (footnote omitted).

of a prior owner's response action.[108] These supporters also assert that the current property owner is in the best position to maintain the protectiveness that the prior response action sought to achieve, by ensuring compliance with whatever future use restriction may have been contemplated as part of the response action. A broader reading also claims an added advantage of guarding a cleanup remedy from being thwarted by changing ownership.

Advocates for the narrow interpretation claim that their interpretation is also consistent with a plain meaning approach in that the term "restriction" incorporates both a prohibited use for the land and an identification of persons subject to that prohibition. Within that framework, the brownfield purchaser must comply with "any" land use restriction established as part of a response action, if the restriction legally binds the brownfield purchaser (such as environmental covenants or government ordinances that bind future owners). The proponents of this view reason that Congress simply meant to add teeth to a preexisting legal obligation by conditioning eligibility for the CERCLA liability defenses on compliance with a restriction that, by its terms, already applied to that owner.[109] This interpretation's proponents argue it conforms to preexisting understandings of the scope of legal instruments that impose restrictions on the use of land that are enforceable against future property owners. Consequently, it avoids the practical problem of requiring compliance with restrictions that may not be clearly set forth in legally binding instruments and may not be readily discoverable.[110] In short, the narrow view reasons that, when Congress said "restriction," it meant a restriction that legally binds the brownfield purchaser seeking to qualify for CERCLA liability protection.

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[108] ASTM CONTINUING OBLIGATIONS GUIDE E2790-11, *supra* note 78, app. X1.7.3.2, at 32 ("Under this 'broad view', the statutory language is interpreted to mean that, in exchange for liability protection, any limitations related to land use must be complied with whenever 'established or relied on in connection with a response action.'") (italics omitted); *id.*, app. X1.7.3.2, at 33 ("Advocates of the broad view assert that compliance with such restrictive language is not imposing a new enforceable obligation on future property owners, but rather simply constitutes another requirement . . . required as a *quid pro quo* for securing a CERCLA [liability defense].") (some italics omitted).

[109] This interpretation is similar to the condition that the defense seeker has complied with all preexisting legally binding notice requirements. *See supra* text accompanying note 74.

[110] *See infra* section III.E.2.

B. By 2002, the Term "Institutional Controls" Had Acquired a Specialized Meaning Through Consistent Administrative Usage

While the plain language of the statute is of little help, the administrative usage of "land use restriction" and especially the term "institutional controls" informs how both terms should be interpreted. Dating back to 1990, the EPA's NCP regulation included an expectation for the use of institutional controls as part of cleanup remedies.[111] The regulation identifies CERCLA §121(d)(2)(B)(ii)(III)[112] as the source of the EPA's authority to use institutional controls when some contaminants will remain in place, although the term "institutional controls" is not used in that section of the statute.[113] In 1998, building upon the NCP regulatory language, the EPA issued a document titled *Institutional Controls: A Reference Manual*.[114] As one commenter described it, the "manual represents an important piece of EPA's efforts to provide greater guidance to EPA attorneys and site managers on the use of institutional controls."[115] Two years later, just over a year before enactment of the Brownfields Amendments, the EPA issued final guidance for identifying and selecting institutional controls.[116]

The 2000 Guidance defines institutional controls as "non-engineered instruments, such as administrative and/or legal controls that minimize the potential for human exposure to contamination by limiting land or

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111 40 C.F.R. § 300.430(a)(1)(iii)(C) (2014) ("In appropriate site situations, treatment of the principal threats posed by a site . . . will be combined with engineering controls (such as containment) and institutional controls . . . for treatment residuals and untreated waste."); *id.* § 300.430(a)(1)(iii)(D) ("EPA expects to use institutional controls such as water use and deed restrictions . . . to prevent or limit exposure to hazardous substances."). For a detailed description of the use of institutional controls in CERCLA remediation governed by the NCP and the procedural requirements for implementing such controls, see Fox, *supra* note 10, at 1236–37.

112 42 U.S.C. § 9621(d)(2)(B)(ii)(III) (requiring enforceable remedial requirements to preclude human exposure to contaminated groundwater between a property boundary and a point of entry of the groundwater into surface water).

113 *See* EPA, EPA 540-F-00-005, OSWER 9355.0-74FS-P, INSTITUTIONAL CONTROLS: A SITE MANAGER'S GUIDE TO IDENTIFYING, EVALUATING AND SELECTING INSTITUTIONAL CONTROLS AT SUPERFUND AND RCRA CORRECTIVE ACTION CLEANUPS, at 3 (Sept. 29, 2000) [hereinafter EPA, IC 2000 GUIDANCE], *available at* http://www.epa.gov/superfund/policy/ic/guide/guide.pdf; *accord*, NCP, Preamble, 55 Fed. Reg. 8666, 8706 (Mar. 8, 1990) ("Institutional controls are a necessary supplement when some waste is left in place, as it is in most response actions" and "are allowed under CERCLA (e.g., section 121(d)(2)(B)(ii).")).

114 EPA, INSTITUTIONAL CONTROLS: A REFERENCE MANUAL (1998) [hereinafter EPA, 1998 REFERENCE MANUAL] (workgroup draft) (on file with Virginia Environmental Law Journal).

115 *See* Seth Schofield, *In Search of the Institution in Institutional Controls: The Failure of the Small Business Liability Relief and Brownfields Revitalization Act of 2002 and the Need for Federal Legislation*, 12 N.Y.U. ENVTL. L.J. 946, 992 (2005).

116 *See* EPA, IC 2000 GUIDANCE, *supra* note 113.

resource use."[117] Both the 2000 Guidance and the 1998 Reference Manual further divide institutional controls into four categories, ranging from institutional controls that "run with the land" and bind subsequent owners, to those that are legally binding only on the current owner, to nonbinding informational tools and notices.[118] The 2000 Guidance acknowledges the variability of who, if anyone, may be bound by each category of institutional controls.[119]

The first category of institutional controls, known as governmental controls, are implemented and enforced by state or local governments under state law and are legally binding under state law.[120] These types of institutional controls include zoning restrictions, ordinances, statutes, building permits, or "other provisions that restrict land or resource use at a site."[121] The EPA has acknowledged that it "must generally turn to state or local governments to establish controls of this type."[122] Once established, these controls are regulated and enforced by local and state government entities.[123]

The second category, known as proprietary controls, also involve legally binding property restrictions governed by state law. According to the 2000 Guidance, proprietary controls include "easements and covenants," meaning "legal instruments placed in the chain of title" of the property.[124] They "have their basis in real property law . . . [and] generally create legal property interests"[125] that are "binding on subsequent purchasers of the property."[126] However, as the 1998 Reference Manual explains, "[p]rinciples of real property law will dictate . . . what limitations may apply to it."[127] The 2000 Guidance

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117 *Id.* at 2. This definition was later codified in the "all appropriate inquiries" rule. 40 C.F.R. § 312.10(b) (2014). *See also* 70 Fed. Reg. 66,070 , 66,087 (codified at 40 C.F.R. §§312.1-312.31); EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 6–7.

118 EPA, 1998 REFERENCE MANUAL, *supra* note 114, at 18; EPA, IC 2000 GUIDANCE, *supra* note 113, at 3.

119 EPA, IC 2000 GUIDANCE, *supra* note 113, at 3–5; *see also* EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 6–7; Larry Schnapf, *Protecting Health and Safety with Institutional Controls*, 14 NAT. RES. & ENV'T 251, 252–53 (2000).

120 EPA, IC 2000 GUIDANCE, *supra* note 113, at 3–4, 12; EPA, 1998 REFERENCE MANUAL, *supra* note 114, at 37.

121 EPA, IC 2000 GUIDANCE, *supra* note 113, at 3.

122 EPA, 1998 REFERENCE MANUAL, *supra* note 114, at 37.

123 EPA, IC 2000 GUIDANCE, *supra* note 113, at 3–4, 12.

124 *Id.* at 4.

125 *Id.* Proprietary controls create legal property interests that are recorded in public land records and have their origin in the common law of servitudes. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1 (2000).

126 EPA, IC 2000 GUIDANCE, *supra* note 113, at 4.

127 EPA, 1998 REFERENCE MANUAL, *supra* note 114, at 19.

further notes that state property law nuances can dictate whether a particular proprietary control qualifies as legally binding, and that in some states some types of proprietary controls may not "run with the land" to subsequent purchasers.[128] However, the enactment of the model Uniform Environmental Covenants Act ("UECA") in 25 states, and somewhat similar non-UECA statues in other states, largely eliminates the risk that proprietary controls would not run to future landowners. These state laws expressly provide for the establishment of environmental covenants that "run with the land," notwithstanding state common law impediments.[129]

The 2000 Guidance defines the third category as "enforcement and permit tools with IC components."[130] Examples include environmental agency orders, permits, and settlement agreements with provisions that "compel the land owner . . . to limit certain site activities."[131] As the 2000 Guidance explains, these controls are legally binding only on the party directly subject to the control and do not "run with the land."[132] The 1998 Reference Manual further explains that an enforcement order "does not bind subsequent owners, or users not named in the order (e.g., lessees)" and a consent decree "does not generally affect the rights of others . . . such as future purchasers or lessees."[133] Under state law, these orders, permits, and settlement agreements are considered contractual, are therefore personal in nature, and are not bound up with the land.[134]

Finally, the fourth category of institutional controls includes informational tools and notices, such as web registries of institutional

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128 EPA, IC 2000 GUIDANCE, *supra* note 113, at 4, 16.

129 *See* Kurt A. Strasser and William R. Breetz, *The Benefits of Uniform State Law for Institutional Controls*, in ABA, IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES, 45–56 (Amy L. Edwards ed.) (2d ed. 2012); Amy L. Edwards, *Institutional Controls: The Converging Worlds of Real Estate and Environmental Law and the Role of the Uniform Environmental Covenants Act*, 35 CONN. L. REV. 1255, 1271–73 (2003); EPA, 1998 REFERENCE MANUAL, *supra* note 114, at 27 n.26 (listing non-UECA state statutes establishing real property use restrictions run with the land notwithstanding common law impediments); *see also* ASTM, GUIDE FOR USE OF ACTIVITY AND USE LIMITATIONS, INCLUDING INSTITUTIONAL AND ENGINEERING CONTROLS E2091-11, §§ 6.6.4–6.6.4.2. For a more detailed discussion of UECA, see *infra* text accompanying notes 209–12.

130 EPA, IC 2000 GUIDANCE, *supra* note 113, at 4 ("[M]ost enforcement agreements are only binding on the signatories, and the property restrictions are not transferred through a property transaction.").

131 *Id.*

132 *Id.*

133 EPA, 1998 REFERENCE MANUAL, *supra* note 114, at 47, 49.

134 *See* Amy L. Edwards, *An Overview of Institutional Controls*, in ABA, IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES, *supra* note 129, at 7, 17–18; ASTM, GUIDE FOR USE OF ACTIVITY AND USE LIMITATIONS, INCLUDING INSTITUTIONAL AND ENGINEERING CONTROLS E2091-11, *supra* note 129, §§ 6.6.6–6.6.6.2.

controls, advisories, and deed notices. While meant to inform, these bind no one.[135]

In addition, EPA guidance appears to recognize a fifth category of institutional controls. These cover non-implemented controls that were contemplated or presumed for use or potential use during the process of designing a cleanup response action, but were never formalized as an institutional control. Tacitly recognizing this non-implemented category, the 2000 Guidance explains that EPA managers "should ensure that ICs are actually implemented."[136] A subsequent 2004 EPA strategy document explains the need to assess "sites where ICs were required as part of the remedy decision, yet one or more of those ICs have not been implemented."[137] More recent 2011 EPA guidance on performing five-year-reviews for cleanup remedies further discusses the distinction between contemplated but non-implemented institutional controls and institutional controls that have actually been implemented. This guidance advises EPA staff to evaluate whether institutional controls have "been implemented as envisioned in the [response action] decision documents." [138] These "non-implemented" controls may not actually rise to the level of an official institutional control, but rather capture anticipated limitations on land uses or activities that were contemplated during remedy design efforts but never actually implemented.[139]

Though the Brownfields Amendments did not define "institutional controls," the consistent administrative usage in the context of CERCLA remedies, dating back to the 1990 NCP, gave specialized meaning to the term[140] by defining "institutional controls" and providing

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135 EPA, IC 2000 GUIDANCE, *supra* note 113, at 4 ("Informational tools provide information or notification that residual or capped contamination may remain on site."); *see also id.* at 24 (describing information devices as having "little or no effect on a property owner's legal rights regarding the future use of the property.").

136 *Id.* at 9.

137 EPA, OSWER 9355.0-106, STRATEGY TO ENSURE INSTITUTIONAL CONTROL IMPLEMENTATION AT SUPERFUND SITES, at 3 (Sept. 2004) [hereinafter EPA, IC 2004 STRATEGY].

138 EPA, OSWER 9355.7-18, RECOMMENDED EVALUATION OF INSTITUTIONAL CONTROLS: SUPPLEMENT TO THE COMPREHENSIVE FIVE YEAR REVIEW GUIDANCE, at 5 (Sept. 13, 2011) [hereinafter EPA, OSWER 9355.7-18]; *see also* Gregory Sullivan & James Miles, *CERCLA "Five-Year Reviews" as a Long-Term Institutional Control Assurance Tool*, in ABA, IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES, *supra* note 129, at 36, 38.

139 EPA, OSWER 9355.7-18, *supra* note 138, at 6.

140 Where a term acquires a specialized meaning or is recognized as a term of art in a particular field, courts assume that Congress intended to give the term the meaning recognized in that field unless there is a contrary indication by Congress. *See, e.g.*, Air Wisconsin Airlines

a detailed explanation as to the legally binding and non-binding nature of the various institutional control mechanisms. Throughout this period, the EPA consistently looked to state law to determine the legally binding nature of each type of institutional control, particularly regarding their binding effect on subsequent property owners. In the absence of a contrary indication, it would be reasonable to conclude that Congress used this specialized term in the way that EPA had consistently used it since it became part of EPA's CERCLA remedial strategy in 1990.[141]

EPA guidance also demonstrates an accepted administrative usage of the phrase "land use restrictions." The 1998 Reference Manual expressly referred to "land use restrictions" as a term covering various government controls, such as zoning ordinances, zoning overlay districts, and other tailored government ordinances.[142] This Manual also identified building permits as a tool that can be utilized as a land use restriction when the permitted activity would be conditioned on not disturbing residual contamination or creating unacceptable exposure.[143] The same is true regarding proprietary controls.[144] The use of "land use restriction" and the word "restriction" by itself in the 1998 Reference Manual referred to legally binding restrictions—government ordinances and legally enforceable proprietary controls.[145]

Similarly, throughout the 2000 Guidance, the EPA used the terms "land use restriction" and "land use controls," as well as the word "restriction" by itself, as descriptive of institutional controls that set

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Corp. v. Hoeper, 571 U.S. ___, 134 S. Ct. 852, 861–62 (2014) ("[I]t is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken.") (quoting FAA v. Cooper, 566 U.S. ___, 132 S. Ct. 1441, 1449 (2012)); McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 342 (1991); Corning Glass Works v. Brennan, 417 U.S. 188, 201 (1974); Morisette v. United States, 342 U.S. 246, 263 (1952); Bilski v. Kappos, 561 U.S. 593, 624 (2010) (Stevens, J., concurring in the judgment); Loving v. IRS, 742 F.3d 1013, 1017 (D.C. Cir. 2014) ("[A]n agency's use of a term can be valuable information not only about ordinary usage but also about any specialized meaning that people in the field attach to that term."). *See generally* 2A SINGER & SINGER, *supra* note 99, at § 47.30; Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947) (Statutes "addressed to specialists . . . must be read by judges with the minds of specialists."); *id.* at 537 ("Words of art bring their art with them.").

141 *See supra* note 140.

142 EPA, 1998 REFERENCE MANUAL, *supra* note 114, at 37–41; *see id.* at 38 ("[O]ne of the most common land use restrictions is the exercise of zoning authority by local governments specifying allowed land uses for certain areas.").

143 *Id.* at 40–41.

144 *Id.* at 32 ("The term 'deed restrictions' should be understood as simply a catchall term for proprietary controls . . . that are legally enforceable against subsequent owner.").

145 *Id.* at 32–34, 37–41.

legally binding restrictions.[146] For example, the 2000 Guidance, reiterating the 1998 Reference Manual, referred to zoning ordinances as a "common land use restriction."[147] The 2000 Guidance also characterized various binding tools (such as easements, zoning ordinances, and administrative orders) as "restrictions,"[148] and specifically referred to state statutes providing contaminated-site proprietary controls that run with the land as "use restrictions."[149]

The administrative usage of the terms "land use restriction" and "institutional controls" helps reveal Congress's intent as to the meaning of these terms. The EPA's usage of the term "institutional controls" referred to the broad set of legally binding and non-binding controls on land use, while the EPA's usage of the term "land use restriction" referred more narrowly to *legally binding* land use controls. Therefore, at the time Congress enacted the Brownfields Amendments, the existing pattern of administrative usage set a definitional framework in which "land use restriction" referred to the subset of "institutional controls" that set legally binding and enforceable restrictions subject to implementation under state and local property law.[150]

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146 EPA, IC 2000 GUIDANCE, *supra* note 113, at 3, 4, 5, 6, 8, 12, 13, 14, 16, 20, 23, 29, 30.

147 *Id.* at 13.

148 *Id.* at 2.

149 *Id.* at 20. Although no court thus far has construed "land use restrictions" in the context of applying the Brownfields Amendments, court decisions in other contexts routinely use the term in describing limitations on the use of land imposed by legally binding instruments such as regulations and zoning ordinances. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (regulations); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 318, 333 (2002) (regulations); Harris v. City of Wichita, 862 F. Supp. 287, 294 (D. Kan. 1994) (regulations); Hunters Ridge Homeowners Ass'n v. Hicks, 818 S.W.2d 623, 624 (Ky. Ct. App. 1991) (zoning ordinance); Wilkerson v. City of Pauls Valley, 24 P.3d 872, 875 (Okla. Civ. App. 2001) (zoning ordinance). While some state statutes limit the term "land use restriction" to use limitations imposed by governmental action (*see, e.g.*, WASH REV. CODE § 35.51.010(4)–(5) (1985) ("public land use restrictions" means restriction imposed by federal, state or local laws, regulations, ordinances or resolutions)), others include recorded property instruments (*see, e.g.*, MISS. CODE ANN. §§ 19-5-10(2)(b), 49-35-5(i) (2012) (deed restrictions or restrictive covenants); Cal. Adv. Legis. Serv. 906 (1989), codified at CAL HEALTH & SAFETY CODE § 25117.13 (written instrument imposing an easement, covenant, or servitude)). The common element among all of these authorities is a binding legal instrument that limits the use of the land. We have found no judicial or statutory authority for applying the term "land use restriction" to a contemplated use limitation that was never incorporated into a binding legal instrument.

150 Michigan had previously adopted a similar interpretation in its state site remediation program, which referred to "enforceable land use restrictions" separately from "other institutional controls." 1995 Mich. Adv. Legis. Serv. 71, codified at MICH. COMP. LAWS § 324.20118 (6)(d)(ii) (remedial actions may be approved with "enforceable land use restrictions or other institutional controls").

C. The Adjacent and Interconnected Contextual Meanings of the Terms "Land Use Restrictions" and "Institutional Controls" Suggest That Congress Intended the Term "Land Use Restrictions" to Refer to Legally Binding and Enforceable Restrictions on the Use of the Property

To understand the meaning of an ambiguous term in one statutory clause, it is often helpful to read what Congress has enacted in an adjacent clause. The Supreme Court followed this approach in *United States v. Atlantic Research Corporation*,[151] when it applied the interpretive canon that "[s]tatutes must be read as a whole,"[152] and in doing so defined which parties could bring a CERCLA cost recovery action by reference to the classes of parties identified in the immediately preceding subparagraph of the statute.[153] The Court identified as significant the fact that the statutory provisions are adjacent, "have remarkably similar structures," and establish a textual relationship between the two that differentiates the relevant costs in the second subparagraph from those in the first.[154]

Under the Brownfield Amendments, the continuing obligations related to "land use restrictions" and "institutional controls" also lie in adjacent, similarly structured, and interconnected statutory provisions. The legislative history, as noted earlier, does little more than repeat the statutory terms.[155] There is nothing in the legislative history indicating Congress was dissatisfied with the specialized meaning given those

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151 United States v. Atl. Res. Corp., 551 U.S. 128 (2007).

152 *Id.* at 135 (internal quotation marks and citation omitted). *See* 2A SINGER & SINGER, *supra* note 99, at § 47.2, 279–82. Justice Ginsburg, while a circuit judge on the District of Columbia Circuit, captured the interpretative principle with the pithy guidance that "[i]f the first rule of statutory construction is 'Read,' the second rule is 'Read On!'." Local Union 1261, United Mine Workers v. FMSHRC, 917 F.2d 42, 45 (D.C. Cir. 1990). More recently, she offered similar guidance, this time as a Supreme Court Justice. Ark. Game and Fish Comm'n v. United States, 568 U.S. ___, 133 S. Ct. 511, 520 (2012) ("[T]he first rule of case law as well as statutory interpretation is: Read on."). The obvious point is that context matters. *See, e.g.*, King v. Burwell, 576 U.S. ___, 135 S. Ct 2480, 2489 (2015) ("[W]e must read words in their context and with a view to their place in the overall statutory scheme. . . . Our duty . . . is to construe statutes, not isolated provisions.") (internal quotation marks and citations omitted); Dolan v. Postal Serv., 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132–33 (2000) (Meaning of words may become evident only when placed in context; court must interpret statute as a "symmetrical and coherent scheme . . . and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted).

153 *Atl. Res. Corp.*, 551 U.S. at 135–36.

154 *Id.* at 135.

155 *See supra* text accompanying note 100.

terms by the EPA in its series of administrative publications since 1990, or evidencing an intent to depart from that usage. Therefore, it is reasonable to conclude that Congress incorporated the specialized meaning consistently given those terms by the EPA in its series of administrative pronouncements on CERCLA's remedial requirements.[156]

A further clue to Congress's intent may be gleaned from the distinct performance obligations applicable to each term. Parties seeking to qualify for one of the CERCLA liability defenses must be "in *compliance* with any land use restrictions established or relied on in connection with the response action" at the property in question.[157] According to the adjacent section of the statute, these parties must also satisfy the lower standard to not "*impede* the effectiveness or integrity of any institutional control employed at the [property] in connection with a response action."[158] The terms "compliance" and "not impede" convey contrasting performance obligations.

The verb "impede" is generally defined as "to retard in movement or progress by means of obstacles or hindrances; obstruct; hinder."[159] This requirement focuses on alerting the brownfield purchaser to refrain from purposeful acts aimed at thwarting the intended result. Like the Supreme Court's recent interpretation of the CERCLA phrase "arrange for disposal" as being aimed at intentional action directed to a specific purpose,[160] Congress appeared to use language that focused on prohibiting intentional conduct directed at the specific purpose of thwarting an institutional control through obstacles or hindrances. There is no suggestion in the legislative materials that Congress was concerned with inadvertent or accidental actions that have the effect of

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156 *See supra* text accompanying notes 140–41.

157 *See* CERCLA §§ 101(35)(A), (40)(F)(ii), 107(q)(1)(A)(v)(II), 42 U.S.C §§ 9601(35)(A), (40)(F)(ii), 9607(q)(1)(A)(v)(II) (emphasis added).

158 CERCLA § 101, 42 U.S.C. § 9601.

159 WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 959 (1996); *see* 7 OXFORD ENGLISH DICTIONARY 705 (2d ed. 1989) ("To retard in progress or action by putting obstacles in the way; to obstruct; to hinder; to stand in the way of.").

160 *See* Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599, 611 (2009)(construing the phrase "arrange for disposal" as an intentional action directed to a specific purpose). Under common law principles, evidence of intent requires more than a showing of purpose to perform the act but also contemplates knowledge that the action is substantially certain to result in the undesired consequence. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 (2010) ("A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result."). *See generally* DAN B. DOBBS, PAUL T. HAYDEN, ELLEN M. BUBLICK, THE LAW OF TORTS § 29 (2d ed. 2011); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 8 (5th ed. 1984).

impeding the effectiveness or integrity of an institutional control, especially when the property owner had no knowledge of the control. [161]

By contrast, Congress's use of the term "compliance" in the adjacent "land use restrictions" clause sends a different message. The term "compliance" typically connotes confirming, acquiescing, or obeying a requirement such as would be imposed in an order, a law, or a regulation that has formally been made effective.[162] Given the context, compliance obligations prescribed by law, regulation, or legal instruments define the required or prohibited conduct, as well as the parties bound by those obligations. Thus, compliance with "any land use restrictions" implies an obligation to conform to restrictions on the use of the property imposed by some type of legal instrument that, by its terms or as a matter of law, binds the property owner seeking to qualify for a CERCLA liability defense.[163]

Further buttressing the inference that Congress viewed "land use restrictions" as the subset of "institutional controls" that have been implemented through a legal instrument and bind current and future property owners is the juxtaposition of the terms "established or relied on" and "employed." According to the statutory text, the "land use restriction" must have been "established or relied on in connection with the response action."[164] The term "established" refers to the formal step or steps that brought the restriction into effect.[165] The phrase "relied on"

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161 One commentator recently challenged EPA's suggestion in its Common Elements Guidance that an example of impeding the effectiveness or integrity of an institutional control would be for the property owner to apply for a zoning change if the current zoning was used for an institutional control, even if the property owner lacked any knowledge of the institutional control. *See* Amy L. Edwards, *Land Use Restrictions and Institutional Controls*, in ABA, IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES, *supra* note 129, at 120 (describing EPA's interpretation as an "unworkable standard that would make it impossible to ever attain any of the [CERCLA liability protections]").

162 WEBSTER'S NEW UNIVERSAL DICTIONARY 419 (1996) ("the act of conforming, acquiescing or yielding . . . conformity; accordance: in compliance with orders . . . cooperation or obedience: [c]ompliance with the law is expected of all.") (italics omitted); WEBSTER'S THIRD NEW INTL. DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 465 (Merriam-Webster ed. 2002) ("cooperation promoted by official or legal authority or conforming to official or legal norms"); 3 OXFORD ENGLISH DICTIONARY, *supra* note 159, at 615 (defining "In compliance with" as "in harmony, agreement, or accordance with; in submission or active obedience to.").

163 *See infra* section III.B (discussing legally binding instruments and nonbinding controls).

164 CERCLA § 101, 42 U.S.C § 9601.

165 *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 608 (5th ed. 2011) (defining "establish" as "to cause . . . to come into existence or begin operating . . . . To introduce and put (a law, for example) into force."); WEBSTER'S THIRD INTL DICTIONARY, *supra* note 162, at 778 (defining "establish" as "to settle or fix or by enactment or agreement . . . to bring into existence, create, make, start, originate, found"); 5 OXFORD ENGLISH DICTIONARY, *supra* note 159, at 404 ("To fix, settle, institute, or ordain permanently, by enactment or agreement.").

refers to the regulatory authority's determination that establishment of the restriction is an essential component on which success of the response action depends.[166] By using the past tense and focusing on the steps that formally initiated the "land use restriction," Congress signaled that compliance with a "land use restriction" was triggered by the instrument that made the restriction legally effective and binding on future property owners.

The contrast with the language describing the relationship between "institutional controls" and the response action is striking. The defense seeker's obligation is simply not to "impede the effectiveness or integrity of any institutional control *employed* at the [property] in connection with a response action."[167] In this context, Congress focused on the existence of an "institutional control" connected to a response action without regard either to the steps of placing the control into effect or the extent to which the response action depends on the existence or effectiveness of the control. The mere existence of the institutional control suffices to trigger the obligation on the part of the brownfield purchaser not to impede the effectiveness or integrity of the control.

Taken in context, the adjacent clauses indicate that Congress understood that establishment of "land use restrictions" required formal steps to bind future property owners, and once those steps have been taken, future owners may be required to comply with the specific use limitations prescribed by those restrictions. The more general "employed" language in the institutional control clause is consistent with the varied nature of institutional controls, with some binding on future owners while others are not. Thus, Congress did not require compliance with all types of institutional controls, many of which are not legally applicable to the future owner. However, it did put defense seekers on notice that they must not purposefully interfere with or retard the effectiveness of an existing control without regard to whom, if anyone, the control is intended to bind. Congress chose language that warned defense seekers that they risk jeopardizing eligibility for a

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166 *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 165, at 1485 (defining "rely" as "[t]o be dependent for help, support, or supply."); 13 OXFORD ENGLISH DICTIONARY, *supra* note 159, at 576 ("To depend on a person or thing with full trust or confidence; to rest upon with full assurance.") (emphasis omitted).

167 *See* CERCLA § 107(q)(1)(A)(v)(II), 42 U.S.C § 9607(q)(1)(A)(v)(II) (emphasis added). "Employ" in this context refers to the existence of some mechanism designed to achieve a specific purpose. *See* AMERICAN HERITAGE DICTIONARY, *supra* note 165, at 585 ("To put something to use or service"); 5 OXFORD ENGLISH DICTIONARY, *supra* note 159, at 190 ("To apply (a thing) to some definite purpose; to use as a means or instrument, or as material.").

CERCLA defense if they impede the effectiveness of a third party's establishment of an institutional control.

In sum, a reading of the adjacent statutory terms "land use restrictions" and "institutional controls," as well as their administrative usage, and the contrasting statutory performance obligations applicable to each, appear to demonstrate that "land use restrictions" are indeed a subset of the broader term "institutional controls." The most appropriate interpretation of "land use restrictions" therefore would limit the reach of the phrase only to the subset of institutional controls that under state or local law bind the defense seeker.

D. EPA's Common Elements Guidance Departs from EPA's Prior Usage of "Land Use Restrictions" and "Institutional Controls"

While, as discussed above, the statutory language in context seems to favor a narrow interpretation of "land use restrictions," a broad reading could interpret this phrase as covering non-binding controls. The broadest interpretation could even read "land use restrictions" to cover non-implemented remedy assumptions, which we previously dubbed the "fifth" category of institutional controls.[168] The EPA's Common Elements Guidance,[169] a document the EPA prepared for staff,[170] takes

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[168] *See supra* text accompanying notes 136-39.

[169] EPA presented its interpretation of the newly enacted Brownfields Amendments in the form of nonbinding guidance. As noted earlier, EPA lacks rulemaking authority to impose its interpretation of the continuing obligations as a regulation having the force of law. *See* EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61; *supra* text accompanying note 76. In addition, even before enactment of the Brownfields Amendments, the District of Columbia Circuit ruled that EPA lacks authority to issue regulations defining CERCLA liability. In *Kelley v. EPA*, the court refused to defer to an EPA interpretation of the scope of CERCLA liability. 15 F.3d 1100, 1107 (D.C. Cir. 1994). As the court explained, EPA's authority to initiate an enforcement action

> is no different . . . than any government "prosecutor" who must in good faith determine for itself whether a civil action in federal court should be brought which necessarily includes a judgment whether a potential defendant violated the law or is "liable." The court is, nevertheless, the first body to formally determine liability, and therefore a civil prosecutor typically lacks authority to issue substantive regulations to interpret a statute establishing liability.

Id. at 1106. *See also* Gonzales v. Oregon, 546 U.S. 243, 258–63 (2006) (absent broad delegation of rulemaking authority to agency to implement entire statute, delegation of rulemaking authority for implementing one part of statute does not include rulemaking authority to define what constitutes criminal conduct under another part of statute); NRDC v. EPA, 749 F.3d 1055, 1063–64 (D.C. Cir. 2014) (EPA has no authority to define affirmative defense to liability in Clean Air Act civil litigation).

[170] The guidance describes itself as being intended solely for EPA and the Department of Justice staff and states that it is not to be construed as creating substantive rights for any person or as a regulation imposing legal obligations on anyone. EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 14. The document was published without notice and opportunity for comment and was issued as interim guidance with the representation that, as EPA gains more experience

the broadest reading. According to the guidance: "[T]he Brownfields Amendments require compliance with land use restrictions relied on in connection with the response action, *even if those restrictions have not been properly implemented through the use of an enforceable institutional control*."[171]

Under the Common Elements Guidance, a restriction is "relied on," and thus constitutes a "land use restriction" whenever it "is identified as a component of the remedy."[172] The EPA goes on to identify the types of documents that could be "relied on" and thus might contain land use restrictions: "risk assessments, remedy decision documents, remedy design documents, permits, orders and consent decrees."[173]

These EPA examples include (1) institutional controls that are legally binding only on the party to whom they were issued (*e.g.*, permits, orders, and consent decrees), as well as (2) non-implemented future use assumptions (*e.g.*, controls contemplated in risk assessments, remedy decision documents, and remedy design documents). One example clearly illustrates the broadest interpretation of non-implemented remedy assumptions which, according to the EPA guidance, nonetheless qualify as land use restrictions:

> [A] chosen remedy might rely on an ordinance that prevents groundwater from being used as drinking water. If the local government failed to enact the ordinance, later changed the ordinance to allow for drinking water use, or failed to enforce

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with the Brownfields Amendments, it may issue revisions. *Id.* at 2. No revisions have as yet been issued. Agency guidance ordinarily does not carry the force of law and hence is not accorded *Chevron*-type deference. *See, e.g.*, Alaska Dept. of Envtl. Conservation v. EPA, 540 U.S. 461, 487–88 (2004) ("Agency's interpretation . . . presented in internal guidance memoranda . . . does not qualify for the dispositive force described in *Chevron*."); United States v. Mead Corp., 533 U.S. 218, 226–31 (2001) (agency interpretation is entitled to *Chevron*-deference only if Congress expressly or implicitly delegated rulemaking authority to agency and rule was promulgated pursuant to such authority); Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."). *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984) (describing what has come to be known as *Chevron*-deference). In the case of the Common Elements Guidance, there is neither a delegation of rulemaking authority nor adherence to the procedural requirements for valid rulemaking. Accordingly, the EPA interpretation would be "entitled to respect only to the extent that it has power to persuade." Gonzales v. Oregon, 546 U.S. at 256 (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (internal quotation marks omitted)).

171 *See* EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 7 (emphasis added).

172 *Id.*

173 *Id.* The Continuing Obligations Guide identifies other documents that might contain such limitations including environmental reports, records of decision, and "No Further Action" letters. ASTM CONTINUING OBLIGATIONS GUIDE E2790-11, *supra* note 78, app. X1.7.3.2, at 32.

> the ordinance, a landowner is still required to comply with the groundwater use restriction identified as part of the remedy to maintain its landowner liability protection.[174]

As becomes clear, the Common Elements Guidance does not view "land use restrictions" as being a subset of institutional controls. Rather, it characterizes "land use restrictions" as any type of restriction contemplated or assumed in any number of response action documents, including risk assessments, remedy design documents, and others, regardless of whether they are made enforceable via an institutional control. While the Common Elements Guidance characterizes institutional controls as the tools that provide a "party with the right to enforce a land use restriction,"[175] it also interprets "land use restrictions" as being binding even when standing alone and not contained within an enforceable institutional control.[176]

Many of the documents identified in the Common Elements Guidance as containing "land use restrictions" by their nature impose no legal obligation on anyone and therefore cannot fairly be described as restricting the future use of the land. The clearest example of such a document is a risk assessment. Risk assessments assume that certain exposure pathways (*e.g.*, groundwater use, soil contact, etc.) will not occur under anticipated future use scenarios. These risk assessment assumptions, in turn, are likely to shape the eventual cleanup remedy because they help define the risk that the remedy needs to address. Such documents typically contain options or recommendations for restricting the use of the land. The most plausible reading of the statute, however, does not support an interpretation that elevates options or recommendations to the level of a "land use restriction" binding on future property owners.[177]

To make a restriction on the future use of the property a "restriction" for which compliance can be reasonably expected from future owners requires two additional steps. First, the option or recommendation must be incorporated by a governmental authority in a response action decision document.[178] This step often establishes institutional controls

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174 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 7–8.

175 *Id.* at 7.

176 *Id.*

177 *See supra* sections III.B and III.C (discussing plausible interpretations of the statutory language).

178 Documents that typically impose legal obligations on CERCLA responsible parties are administrative and other enforcement orders, consent decrees, and records of decision (RODs). *See* 40 C.F.R. §§ 300.810(a)(4), (5) (2014) (administrative record includes decision documents

categorized as "enforcement and permit tools with IC components."[179] These types of controls, however, only involve legally binding restrictions as to the party directly subject to the order or settlement agreement, and do not run with the land.[180] Second, to bind future property owners, the restriction must be incorporated in legal instruments such as zoning ordinances, covenants, or easements that establish legally binding land use restrictions that run with the land.[181]

The conclusions in the EPA guidance, applying the broadest reading of "land use restrictions," lack any associated discussion of the legislative history or interpretation of the statutory language.[182] The guidance does not reference earlier published EPA materials which, in characterizing "land use restrictions," describe the legally binding subset of institutional controls.[183] The guidance does acknowledge that Congress used different language to describe the distinct performance obligations ("does not impede" versus "to be in compliance"[184]) regarding institutional controls and land use restrictions, but the guidance simply notes that a party seeking to qualify for CERCLA liability defenses must satisfy both obligations.[185] The guidance does not assess how these varied performance obligations could aid in the interpretation and intended meaning of "land use restrictions."[186]

The EPA guidance, in effect, makes the brownfield purchaser the guarantor of compliance with all previously contemplated land use

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and enforcement orders); *see also id.* at § 300.430(f)(5) (the ROD documents the selected remedy in detail).

179 *See supra* text accompanying notes 130–34 (discussing enforcement and permit tools with IC components).

180 Orders and consent decrees can include restrictions on property, enforceable against the parties to the proceeding. *See id.*

181 *See supra* text accompanying notes 124–29.

182 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 7 ("[T]he Brownfields Amendments require compliance with land use restrictions relied on in connection with the response action, even if those restrictions have not been properly implemented through the use of an enforceable institutional control.") (no citation provided). By contrast, recent EPA guidance does not mention the thesis of the *Common Elements Guidance*. This guidance, issued in 2011, rests on the premise that third parties not subject to the remedial orders of the response action may be bound by an institutional control only if the nature of the legal instrument binds future owners (*e.g.*, governmental or proprietary controls, statutory environmental covenants, or the responsible party has contracted with third parties not to modify an institutional control without prior EPA approval). *See* EPA, OSWER 9355.7-18, *supra* note 138, at 5–7.

183 *See supra* text accompanying notes 146–49.

184 *See* CERCLA §§ 101(35)(A), (40)(F)(i), 107(q)(1)(A)(v)(I), 42 U.S.C §§ 9601(35)(A), (40)(F)(i), 9607(q)(1)(A)(v)(I) (statutory provisions with " does not impede" and "to be in compliance" language).

185 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 6.

186 *See id.* at 6–8.

restrictions stemming from a response action at the property, regardless of its implementation history under prior owners. In fact, under the Common Elements Guidance, the innocent purchaser would risk forfeiting the CERCLA liability defenses even if the overseeing regulatory authority never monitored or sought to remedy the lack of a required institutional control before purchase of the property.[187]

The EPA guidance understandably reads "land use restriction" broadly. A broad interpretation would partially help to overcome a variety of perceived problems concerning institutional control implementation and enforcement.[188] The EPA may have believed that these implementation shortcomings could be surmounted by imposing upon brownfield purchasers the need to adhere to future use assumptions even if those assumptions did not run with the land and they were never properly implemented as institutional controls. While closing a gap left by a then-fledgling institutional control enforcement regime might be beneficial, nothing in the Brownfields Amendments or its legislative history suggests that Congress intended to close an institutional control enforcement gap by placing the obligation to remedy the problems on future purchasers of brownfields properties. Throughout the legislative materials, they were viewed by Congress as wholly innocent, and hence are parties that should not be liable for the costs of remedying environmental problems at these properties. Indeed, the legislative materials suggest Congress's adherence to terminology consistent with established administrative usage.

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187 EPA has a statutory duty to review and update implementation of a CERCLA remedy where some contaminants are left in the ground at least every five years. *See* CERCLA § 121(c), 42 U.S.C. § 9621(c) (all CERCLA remedial action sites where hazardous substances or pollutants and contaminants are left in the ground must be reviewed at least every five years); *see also* 40 C.F.R. § 300.430(f)(4)(ii) (2014) (NCP implementation of five year review provision). Because institutional controls are typically not implemented by EPA but are implemented by parties to the response action or by state or local governments, EPA recognizes that it has a duty to ensure that obligations to implement an institutional control have been carried out properly. EPA, OSWER 9355.7-18, *supra* note 138, at 5–6.

188 For detailed discussion of institutional problems, see generally Schofield, *supra* note 115 at 986–97; Daniel S. Miller, *Putting the "Institution" in State Institutional Control Laws: Colorado's Senate Bill 145*, 35 CONN. L. REV. 1283 (2003); Jim Spaanstra, Daniel S. Miller & Linda Rockwood, *Institutional Controls: Brownfields Superweapon or Ultimate Trojan Horse*, 15 NAT. RES. & ENV'T 104 (2000); Mary R. English & Robert B. Inerfeld, *Institutional Controls for Contaminated Sites: Help or Hazard?*, 10 RISK: HEALTH SAFETY & ENV'T 121 (1999).

E. A Narrow Interpretation of "Land Use Restrictions" to Refer to Legally Binding and Enforceable Restrictions on the Use of a Property Is Consistent with Traditional Principles of Statutory Construction

Familiar tools of statutory interpretation signal a clear direction toward a narrow, rather than broad, reading by avoiding dual federal and state standards, setting fair rules for identifying institutional controls and land use restrictions, and aligning with the intent of the Brownfields Amendments to balance redevelopment of brownfield properties with environmental protection.

1. A Narrow Interpretation Avoids Dual Federal and State Property Law Standards

The courts have developed a statutory canon of construction for avoiding dual federal and state standards. This canon disfavors interpretations that depart from settled state or common law principles in the absence of clear indications that Congress intended such a departure. The Supreme Court has already applied this canon to CERCLA by rejecting a government attempt to ignore the corporate distinction between a liable corporate subsidiary and its corporate parent.[189]

A narrow interpretation of "land use restrictions" comports with this canon, because it reads the term as being limited to restrictions that, under settled state law, are legally binding against the party seeking the CERCLA defense. Indeed, two years after passage of the Brownfields Amendments, the EPA explicitly acknowledged the relevance of settled state law, explaining that selecting a particular institutional control for a site requires consideration of the "intersection of environmental cleanup law and the traditional law of real property."[190] There is no suggestion that settled principles of who is subject to and bound by various institutional controls had been superseded by the Brownfields Amendments. In particular, the guidance instructed that if the

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[189] *See* United States v. Bestfoods, 524 U.S. 51, 63 (1998) ("CERCLA is thus like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute . . . ." (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979)) (internal quotation marks omitted). For non-CERCLA application of the canon, *see*, *e.g.*, United States v. Texas, 507 U.S. 529, 534 (1993) ("[T]o abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.") (internal quotation marks omitted); Kungys v. United States, 485 U.S. 759, 770 (1988) (inferring that the use of a term that has settled meaning under common law or equity reflects congressional intent to incorporate that meaning unless otherwise indicated).

[190] EPA, IC 2004 STRATEGY, *supra* note 137, at 2 n.3.

instrument used to implement the control does not bind future owners of the property, the use of that instrument needs to be revisited.[191] This 2004 guidance shows an awareness that existing law provided established mechanisms for modifying institutional controls or land use restrictions to cover future property owners on a case-by-case basis, without suggesting reliance on an expansive reading of the Brownfields Amendments. By avoiding different federal and state compliance obligations on an issue historically grounded on state property law, the federal statute is read in a manner that accords due respect to state law in an area of primary interest to state and local governments.[192]

Even setting aside the issue of settled state law, courts disfavor interpretations that assume Congress adopted profound changes in federal law without some indication in the statute or the legislative history of such intent.[193] Outside of the Brownfields Amendments, property owners must comply with legally binding restrictions as to their own property. For example, prior to the Brownfields Amendments, administrative orders or consent decrees in CERCLA litigation were understood to apply only to parties to the litigation or administrative proceedings.[194] An expansive interpretation of "land use restrictions"

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[191] *Id.* at 9 (referring to the need to revisit any assumption that a recorded Consent Decree binds future owners).

[192] *See, e.g.*, Solid Waste Agency of N. Cook Cnty. v. Army Corps of Engineers, 531 U.S. 159, 172–74 (2001) (avoiding construing statute in a way that alters the federal–state framework by encroaching on traditional state power over land and water use unless Congress has given clear indication that it intended such a result) (citing United States v. Bass, 404 U.S. 336, 349 (1971)); *cf.* Bond v. United States, 572 U.S. ___, 134 S. Ct. 2077, 2089 (2014) (requiring clear statement of congressional intent to alter balance of state and national authority).

[193] *See, e.g.*, Bd. of Trustees of Leland Stanford Junior Univ. v. Roche Molecular Sys., 563 U.S. 776, 792 (2011) ("[I]f Congress had intended such a sea change in intellectual property rights, it would have said so clearly—not obliquely through an ambiguous definition . . . and an idiosyncratic use of the word [at issue]."); United States v. O'Brien, 560 U.S. 218, 231 (2010) ("Congress does not enact substantive changes *sub silentio*."); Whitman v. Am. Trucking Ass'n, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."); Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 613–14 (1991) (declining to find congressional intent to impose significant limitation on Board's rulemaking authority because Court "would expect to find some expression of that intent in the legislative history."); Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980) ("In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give the Secretary [this] unprecedented power over American industry . . . ."); Harrison v. PPG Indus., Inc., 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("In a case where the construction of legislative language . . . makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.") (subsequently dubbed the "Canon of Canine Silence" in *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting).

[194] EPA, IC 2000 GUIDANCE, *supra* note 113, at 5, 22.

would require future property owners to comply with orders and consent decrees, even though they were not parties to the proceedings that led to the orders or decrees. Nothing in the legislative history evidences Congress contemplated such a profound departure from settled law on the extent to which administrative orders and consent decrees may bind nonparties.

The legislative history contains no indication of a congressional preference to substitute a federal compliance obligation for future property owners where no such obligation existed under state law. Prior to the Brownfields Amendments, no statute adopted separate federal compliance obligations for land use restrictions and institutional controls in the context of remediation of contaminated property. As previously noted, EPA guidance confirmed that mechanisms for implementing institutional controls were grounded on existing state property law.[195] Moreover, legislative debates on the Brownfields Amendments signaled no dissatisfaction from Congress with state cleanup programs. Indeed, much of the legislation is premised on assisting state and local cleanup programs and restricting the federal role where the states are addressing a contaminated property.[196] To establish a uniquely federal compliance standard binding on future property owners, without a clear statement of such intent either in the statute itself or in the legislative history, would be highly unusual.[197]

2. A Narrow Interpretation Provides Fair Notice to Brownfield Purchasers of Their Land Use Compliance Obligations

A broad interpretation of "land use restrictions," such as that adopted by the EPA, could raise serious issues of fairness and possibly constitutional due process concerns. For example, non-binding institutional controls (such as notices or other controls that do not run with the land), as well as non-implemented remedy assumptions (those dubbed the "fifth" category) would not be readily discoverable by brownfield purchasers through the exercise of reasonable due

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195 *See supra* text accompanying notes 120–35.

196 *See supra* text accompanying notes 31–33.

197 Congress clearly knew how to distinguish between continuing obligations that require compliance with preexisting legal obligations and those that impose new requirements. *Compare* CERCLA § 101(40)(C), 40 U.S.C. § 9601(40)(C) (preexisting obligation to "provide[] all legally required notices with respect to the discovery or release of any hazardous substances at the facility"), *with id.* § 101(40)(E), 40 U.S.C. § 9601(40(E) (new requirement absent a CERCLA § 104(e) order to "provide[] full cooperation, assistance, and access to persons that are authorized to conduct response actions or natural resource restorations").

diligence.[198] Ordinarily, identification of institutional controls would occur during the pre-acquisition stage, when all appropriate inquiry is made into the prior ownership and use of the property. Under the EPA's all appropriate inquiries rule, the types of documents described as likely sources of information on institutional controls include chain of title documents, interviews with past and present owners, operators, and occupants, and review of governmental records. However, the rule does not mention risk assessment or remedy design documents,[199] neither of which the National Contingency Plan identifies as either decision documents or enforcement orders.[200]

The search for obscure unrecorded institutional controls could become as uncertain as a game of potluck, but the potential consequences can be quite severe if eligibility for the CERCLA defenses is lost. When the stake is one of legal liability with potentially significant damages, a settled body of case law establishes the principle that a person is entitled to fair notice of what conduct is required to avoid liability. This concept implicates constitutional due process principles.[201] The Supreme Court recently reaffirmed this principle as grounded in the Fifth Amendment's Due Process Clause.[202] In *FCC v. Fox Television Stations, Inc.*, the Court identified two due process concerns that the fair notice doctrine addresses: "[F]irst, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[203]

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198 *See* ASTM CONTINUING OBLIGATIONS GUIDE E2790-11, *supra* note 78, app. X1.7.3.2, at 33 ("[P]roponents of the narrow view caution that any 'limitations' that are not contained in a binding instrument may not be readily discoverable when prospective future owners conduct 'all appropriate inquiries.'").

199 *See* 70 Fed. Reg. 66,070, 66087 (codified at 40 C.F.R. §§ 312.1–312.31 (2014)).

200 *See* 40 C.F.R. §§ 300.810(a)(4), (5) (2014); *see also id.* at § 300.430(f)(5).

201 *See, e.g.*, FCC v. Fox Television Stations, Inc., 567 U.S. ___, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); Martin v. Occupational Safety & Health Rev. Comm'n, 499 U.S. 144, 158 (1991) (use of an enforcement citation as the initial means for announcing a particular interpretation of a regulation may bear on the adequacy of notice to regulated parties); Fabi Constr. Co., Inc. v. Sec'y of Labor, 508 F.3d 1077, 1088 (D.C. Cir. 2007) (announcement of regulatory interpretation for the first time in the context of an adjudication deprives party of fair notice and implicates the Due Process Clause); United States v. Chrysler Corp., 158 F.3d 1350, 1354–55 (D.C. Cir. 1998) (requirement of fair notice of what a regulation requires before agency may find noncompliance).

202 U.S. CONST. amend. V.

203 *Fox*, 132 S. Ct. at 2317 (citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)). The canon of constitutional avoidance would likely be a factor against the broad interpretation. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 380–81 (2005) (when choosing between

The unfairness posed by a broad reading is particularly stark in the case of non-implemented controls, because parties would not know what is required. Even if they did, no precise rules govern how a purchaser would comply with an assumption in a remedy that does not actually legally bind the purchased property. For example, if non-enacted government ordinances were deemed land use restrictions,[204] the broad interpretation would require the innocent purchaser to know that a historical remedy meant to rely on an ordinance that a local government had failed to enact (or, if enacted, had later modified), and then to learn which non-enacted (and thus not legally binding) provisions the remedy meant to rely on. If the purchaser failed to reconstruct the intended restrictions even after the local government failed to enact the ordinance, the broad interpretation would still penalize the brownfield purchaser.

In addition to non-implemented institutional controls, fairness issues also exist in the case of institutional controls that, while implemented, are not legally binding against the brownfield purchaser. To be sure, a reasonable due diligence would likely have a better prospect of identifying institutional controls if the response action occurred in the recent past under the ownership of the seller from whom the prospective purchaser is acquiring the property. Interviewing the seller, as required by the all appropriate inquiry rule and the Phase I Practice, [205] is likely to uncover such institutional controls (unless the seller is himself in noncompliance with the restriction). Ascertaining the existence of an institutional control becomes far more difficult if the response action occurred many years earlier (such as in the first few years after CERCLA's enactment in 1980), the property has changed hands on multiple occasions thereafter, and the land use restriction was not in place when the prospective purchaser acquired the property.[206]

Unfortunately, this scenario is quite plausible if the property conveyances prior to the latest sale occurred before 2002 and the restriction was not incorporated in an enforceable institutional control

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two plausible statutory constructions, courts should avoid construction raising a multitude of constitutional problems).

[204] *See supra* text accompanying note 174 (discussing non-enacted ordinances as land use restrictions).

[205] *See* 40 C.F.R. § 312.23(b) (2014); ASTM E1527-13 PHASE I PRACTICE, *supra* note 19, §§ 7.2.3.1, 10.

[206] EPA's hypothetical of a local government that failed to adopt or maintain an ordinance restricting the use of groundwater poses similar discovery concerns. *See supra* text accompanying note 174. Assuming this failure occurred many years before the Brownfields Amendments were enacted, it would be extremely difficult to find a local ordinance that was never enacted or was subsequently repealed.

appropriately recorded. In that circumstance, the restriction would have bound none of the pre-2002 purchasers. Unless the institutional control was recorded in some manner, such as in a deed or a covenant, the institutional control would not have "run with the land" to future owners. As such, it would have been nearly impossible for the prospective purchaser to know whether he had identified all land use restrictions that may have been established or relied on in connection with a response action at the property.[207]

In contrast, legally binding restrictions are readily discoverable during all appropriate inquiries procedures because such institutional controls are recorded in the land records as matters affecting title, which is a specific area to be reviewed under the all appropriate inquiries process.[208] For example, the increased use of legally binding "environmental covenants," established under state UECA laws, provides a readily discoverable restriction that "runs with the land." In 2003, the National Conference of Commissioners on Uniform State Laws (now the Uniform Law Commissioners) adopted the UECA to provide "clear rules for a perpetual real estate interest—an environmental covenant—to regulate the use of brownfields when real estate is transferred from one owner to another."[209] The UECA serves several functions: it establishes that (1) environmental covenants must state all the restrictions on the property and the owner's monitoring and other obligations; (2) the covenants must be recorded in the state's land records to give legal notice of the covenant and to facilitate discovery by future owners; (3) states may establish a registry of environmental covenants that is electronically searchable; (4) the covenants must be agreed to by the property owner and the overseeing regulatory agency; and (5) the covenants must identify a holder who performs supervisory

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[207] The Reporter of the Uniform Environmental Covenants Act (UECA) Drafting Committee, Professor Kurt A. Strasser, has observed that recording a covenant containing a land use restriction was an essential element in UECA to avoid "run[ning] a great risk of being forgotten over time and overlooked in future land use decisions . . . .". Kurt A. Strasser, *The Uniform Environmental Covenants Act: Why, How, and Whether*, 34 B.C. ENVTL. AFF. L. REV. 533, 557 (2007). For a description of the UECA, see *infra* text accompanying notes 209–12.

[208] *See* 40 C.F.R. § 312.24(a) (2014) (requirement to review historical documents and records includes chain of title documents and land use records); ASTM E1527-13 PHASE I PRACTICE, *supra* note 19, § 8.2.3 (prescribing local land records to be reviewed to identify institutional controls and land use restrictions).

[209] *See* UNIF. LAW COMM'N, *Legislative Fact Sheet—Environmental Covenants Act* (2014), http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Environmental Covenants Act (last visited Apr. 17, 2015).

responsibilities for enforcement of the covenant.[210] The EPA has described UECA as allowing "long-term enforcement of clean-up controls . . . to be contained in a statutorily-defined, voluntary agreement known as an 'environmental covenant' which will be binding on subsequent purchasers and tenants of the property and be listed in the local land records."[211] As of April 2015, 25 states, territories, and other jurisdictions have adopted the UECA.[212]

The concern about fair notice also applies to the obligation not to impede the effectiveness or integrity of an institutional control. The existence of a deed restriction or some other notation of contamination in the land records would almost certainly satisfy a fair notice requirement, since such a notice should be discovered during the course of the pre-acquisition all appropriate inquiries or Phase I due diligence.[213] But, to use one of the Senate Committee's examples of impeding the effectiveness or integrity of an institutional control,[214] moving or removing a fence can be a perfectly innocent action by a new property owner if the property owner had no knowledge about the purpose of the fence as an institutional control. This raises the question whether Congress intended to deprive the innocent property owner, who inadvertently impaired the effectiveness or integrity of an institutional control about which the party had no knowledge, of a CERCLA liability defense. As noted earlier, there is no evidence of Congress's concern with actions that inadvertently or unintentionally impede the effectiveness or integrity of an institutional control, especially when the owner had no knowledge of the control, had undertaken reasonable due diligence consistent with the all appropriate inquiries rule, and acted in a

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[210] *See* Strasser, *supra* note 207, at 537–40 (citing various sections of UECA); Amy L. Edwards, *An Overview of Institutional Controls*, in ABA, IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES, *supra* note 129, at 8–11.

[211] EPA, UNIFORM ENVIRONMENTAL COVENANTS ACT 1, http://www.epa.gov/superfund/policy/ic/pdfs/kerr_ueca.pdf (last visited Apr. 17, 2015).

[212] *See* UNIF. LAW COMM'N, *Legislative Fact Sheet—Environmental Covenants Act*, *supra* note 209; *see also* Kurt A. Strasser and William R. Breetz, *The Benefits of Uniform State Law for Institutional Controls*, in ABA, IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES, *supra* note 129, at 46; Amy L. Edwards, *An Overview of Institutional Controls*, in ABA, IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES, *supra* note 133, at 27 n.11.

[213] *See* 70 Fed. Reg. 66,070, 66,807 (codified at 40 C.F.R. §§ 312.1–312.31 (2014)) (describing the provisions of the AAI rule through which institutional controls might typically be identified); ASTM E1527-13 PHASE I PRACTICE, *supra* note 19, §§ 5.4, 8.2.3 (describing records where the existence of institutional controls may be identified).

[214] S. REP. 107-2, at 12 (2001).

manner consistent with normal property management by a new property owner.[215]

Non-implemented or non-binding institutional controls could go undetected under the due diligence procedures prescribed by the EPA's all appropriate inquiries regulation. Institutional controls that legally bind brownfield purchasers, however, can readily be found using those procedures. Fairness therefore favors an interpretation that limits the meaning of "land use restrictions" to those readily discoverable, while avoiding an interpretation that penalizes the innocent property owner who lacked knowledge of a non-implemented or non-binding institutional control despite conducting due diligence in accordance with the EPA's regulations.

3. A Narrow Interpretation Reinforces the Overall Purpose of the Brownfields Amendments to Promote Brownfields Restoration

As the previous discussion demonstrates, the broad interpretation poses practical problems that seem incompatible with the incentives for brownfields restoration at the heart of the Brownfields Amendments. As noted earlier, a prime aim of the Brownfields Amendments was to create incentives for redeveloping abandoned brownfield properties and to restore these properties to economic viability, subject to reasonable environmental remedial goals.[216] A major driver for this legislation was the refusal of developers to step forward and acquire these properties due to fear of potential CERCLA liability.[217] If the legislative history is unambiguous about anything, it is Congress's intent to remove this fear.[218] The broad interpretation would perpetuate the uncertainties that deterred developer action prior to 2002, because identifying "land use restrictions" would be divorced from settled legal principles of identifying who is bound by existing legal instruments. Even worse, CERCLA liability protection could turn on hypothetical restrictions identified in a remedial options document that never rose to the level of a binding institutional control. By relying on established legal principles in defining "land use restrictions" and "institutional controls," the narrow interpretation limits "land use restrictions" to institutional controls embodied in legal instruments that bind the purchaser of the property. Consequently, incentives for brownfields redevelopment are

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215 *See supra* text accompanying note 161.
216 *See supra* text accompanying note 2, 36.
217 *See supra* text accompanying note 22.
218 *See supra* text accompanying notes 10–11, 25–33.

reinforced and consistent with the environmental conditions expressly set forth in the statute.

IV. RECONCILING THE POST-ACQUISITION BAN ON "DISPOSAL" OF HAZARDOUS SUBSTANCES WITH THE REQUIREMENT TO MANAGE "RELEASES" BY TAKING "REASONABLE STEPS"

The 2002 Brownfields Amendments require BFPP and ILO defense-seekers to show that all "disposal" of hazardous substances occurred prior to their acquisition of the property.[219] At the same time, the defenses require a lesser showing as to "releases." Rather than a blanket prohibition on releases after acquiring the property, BFPP and ILO defense seekers need only show that they *managed* any releases after acquiring the property by taking "reasonable steps" to (i) stop any continuing release; (ii) prevent any threatened future release; and (iii) prevent or limit exposure to any previously released hazardous substance.[220]

CERCLA's definitions of "disposal" and "release" overlap and intertwine, with "release encompassing "disposal" but also reaching more broadly.[221] The term "disposal" has been defined in the statute since CERCLA's original enactment in 1980 by referring to the definition in the Solid Waste Disposal Act,[222] which in turn defines "disposal" with seven descriptive terms. "Disposal" means "the [1] discharge, [2] deposit, [3] injection, [4] dumping, [5] spilling, [6] leaking, or [7] placing of any solid waste or hazardous waste into or on any land or water."[223] CERCLA defines "release" more broadly with 12 descriptive terms, including five that overlap with the "disposal" terms as well as the term "disposing" itself.[224] The term "release" means "any [1] spilling, [2] leaking, [3] pumping, [4] pouring, [5] emitting, [6]

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219 CERCLA §§ 101(35)(A), 101(40)(A), 42 U.S.C. §§ 9601(35)(A), 9601(40)(A). As noted earlier, there is no counterpart disposal ban in the provision establishing the CPO, but CPO defense seekers must show that they "did not cause, contribute, or consent to the release." CERCLA § 107(q)(1)(A)(i), 42 U.S.C. § 9607(q)(1)(A)(i)).

220 CERCLA §§ 101(35)(B), 101(40)(D), 42 U.S.C. §§ 9601(35)(B), 9601(40)(D).

221 *See* United States v. CDMG Realty, 96 F.3d 706, 714–15 (3d Cir. 1996) (comparing CERCLA's definitions of "release" and "disposal"); Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 878 (9th Cir. 2001) (en banc), ("'release' is broader than 'disposal' because the definition of 'release' includes 'disposing'").

222 CERCLA § 101(29), 42 U.S.C. § 9601(29) (cross-referencing section 1004 of the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6903). The SWDA is more commonly identified as the Resource Conservation and Recovery Act (RCRA), Pub. L. No. 94-580 (1976) (codified as amended at 42 U.S.C. §§ 6901–6992k).

223 RCRA § 1004(3), 42 U.S.C. § 6903(3).

224 *Carson Harbor Village,* 270 F.3d at 878.

emptying, [7] discharging, [8] injecting, [9] escaping, [10] leaching, [11] dumping, or [12] *disposing* into the environment."[225] "Release" lists additional terms, including "leaching" and "escaping," which "disposal" does not.[226]

A line of cases interpret "disposal" outside of the brownfields redevelopment context. These cases address "disposal" under CERCLA §107(a)(2), the CERCLA provision that defines liable parties as prior owners or operators "at the time of disposal."[227] First, these disposal cases widely hold that, in addition to the initial introduction of hazardous substances, subsequent active dispersal of contaminants, such as during excavation or grading development activities, also constitutes a disposal.[228] Second, but without uniformity, some circuit courts also hold or strongly suggest that passive migration, particularly the leaking of contaminants from drums or tanks, can be a disposal.[229] In addition to the disposal line of cases, a host of CERCLA judicial opinions also interpret "release" as broadly including gradual spreading of contaminants, leaking from tanks, and active dispersal of previously released hazardous substances.[230]

The dual "release" and "disposal" requirements of the BFPP defense, combined with the judicial interpretations given to these terms under pre-2002 Superfund case law, leaves BFPPs and ILOs with a lose-lose choice or, worse yet, doomed to lose the defense. If, for example, they engage in reasonable steps to manage releases, they could nonetheless lose the defense if their activities involve any type of dispersal or spreading of contaminants. Though a nearly inevitable occurrence during any brownfield redevelopment activity, such dispersal could constitute "disposal." Or, if implementing reasonable steps after acquiring the property would take some time, courts could find any passive leaking of existing contaminants to be a prohibited disposal after acquisition. Indeed, a BFPP case considering this issue concluded that the leaking of existing contaminants during site redevelopment is a prohibited disposal.[231]

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225 CERCLA § 101(22), 42 U.S.C. § 9601(22) (emphasis added); *see Carson Harbor Village*, 270 F.3d at 878 (comparing "release" and "disposal").

226 *Carson Harbor Village*, 270 F.3d at 876; *CDMG Realty*, 96 F.3d at 715.

227 CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

228 *See infra* section IV.A.2.

229 *See infra* section IV.A.1.

230 *See infra* section IV.D.

231 Ashley II of Charleston, LLC v. PCS Nitrogen Inc., 791 F. Supp. 2d 431, 499 (D.S.C. 2011). On appeal, the Fourth Circuit decided the case on other issues and did not address whether the BFPP seeker's redevelopment activities constituted disposal. PCS Nitrogen Inc. v. Ashley II

This disposal-release conundrum marks an important and complex issue for brownfields redevelopment. It pits statutory terms against each other in a complicated way, yet leaves BFPPs that engage in the development activity Congress sought to promote potentially doomed to never succeed on the defense.[232] Perhaps because of the complexities, the EPA's Common Elements Guidance expressly ignored this issue,[233] but no additional guidance on the issue exists. This section of the article closely analyzes the interpretative issue and proposes a workable reconciliation of the BFPP's prohibition on post-acquisition disposal with the related requirement to manage releases. The proposed interpretations remain faithful to the statutory text and Congress's key goal in the Brownfields Amendments to remove disincentives in CERCLA that discourage acquisition and restoration of brownfields properties.

A. The Meaning of Disposal

The term "disposal" has existed in CERCLA since its enactment.[234] Section 107(a)(2) makes owners or operators of any facility "at the time of disposal of any hazardous substances" potentially liable parties.[235] This prior owner/operator liability provision served CERCLA's 1980 intent for broad liability.[236] Not surprisingly, prior owners who were sued under CERCLA had their liability turn on whether "disposal" occurred during their ownership.

In the case where a person initially introduces hazardous substances into the environment, such as by a new spill or new deposit, the activity squarely meets the definition of "disposal."[237] Other than the initial

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of Charleston LLC, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013).

232 *See* Fenton D. Strickland, Note, *Brownfields Remediated? How the Bona Fide Prospective Purchaser Exemption from CERCLA Liability and the Windfall Lien Inhibit Brownfield Redevelopment*, 38 IND. L. REV. 789, 796–98 (2005). The Court of Appeals for the Third Circuit identified a similar conundrum between the term "disposal" and the dispersal of contaminants resulting from the prospective purchaser undertaking appropriate inquiry and inspection of soil conditions, a prerequisite for ILO eligibility. United States v. CDMG Realty, 96 F.3d 706, 721 (3d Cir. 1996); *see also infra* section IV.B.

233 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 2 ("[T]he criterion that a bona fide prospective purchaser and innocent landowner purchase the property after all the disposal of hazardous substances . . . [is] not addressed").

234 *See supra* text accompanying note 222–23.

235 CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

236 *See supra* text accompanying notes 4–9.

237 *See, e.g.*, Kaiser Alum. & Chem. Corp. v. Catellus Develop. Corp., 976 F.2d 1338, 1342 (9th Cir. 1992) (disposal includes the initial introduction of hazardous substances); Nurad, Inc. v.

introduction scenario, however, the analysis becomes more complicated and has resulted in two lines of CERCLA §107(a)(2) case law covering "disposal" in the non-initial introduction scenario. First, the passive migration line of cases emerged. These cases actually involve two categories of passive migration: (1) the gradual passive spreading of contaminants, such as contaminant movement through soil or water, and (2) the passive leaking of contaminants from drums, barrels, or tanks into soil or water. The second line of CERCLA §107(a)(2) cases addresses whether active dispersal of contaminants due to human-aided site activities, such as excavation and grading during property development, constitutes disposal. [238] The following sections discuss each line of cases in turn.

1. The Federal Courts Are Divided on Whether Passive Migration of Contaminants Constitutes "Disposal"

The passive migration line of cases dates back to at least 1992, with five circuit courts directly or impliedly addressing the issue since then.[239] As noted, the cases divide into (1) those that address gradual spreading of contaminants in the environment (*e.g.,* passive migration through soil or groundwater), (2) those that address leaking from tanks or drums, and (3) those that reject either type of passive migration as constituting disposal. Passive migration cases have been widely studied by legal commentators, all of whom explain in some detail that the five circuit courts addressing the issue disagree on whether or when "passive migration" can be "disposal."[240] On one end of the spectrum, courts hold

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William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992) (disposal covers active dumping or placing of hazardous waste at a facility).

[238] This circumstance is sometimes referred to as a "secondary disposal." *See, e.g.*, PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 177 (4th Cir. 2013), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013) (defining "secondary disposal" as "the movement or dispersal of already-once disposed hazardous substances through earthmoving or construction activities"); *see also Kaiser Alum.*, 976 F.2d at 1342 (excavation and grading could be a disposal under CERCLA § 107(a)(2)); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988) ("[T]here may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings."). The legislative history of the Brownfields Amendments manifests no congressional awareness of these cases.

[239] *See* Emilee Mooney Scott, Note, *Bona Fide Protection: Fulfilling CERCLA's Legislative Purpose by Applying Differing Definitions of "Disposal*," 42 CONN. L. REV. 957, 980 (2010) (citing cases from the Second, Third, Fourth, Sixth, and Ninth Circuits).

[240] For a detailed discussion of court decisions addressing passive migration as "disposal," see Thomas J. Braun, Note, *Cleaning up the Comprehensive Environmental Response, Compensation, And Liability Act: The Ambiguous Definition of "Disposal" and the Need for Supreme Court Action*, FED. LAW., Oct. 2011, at 58–59 (urging Supreme Court action to resolve

that passive migration, at least in the context of leaking tanks, can be disposal.[241] On the other end, courts take the "active only" approach, which rejects passive migration as disposal, and hold instead that disposal only occurs when active human intervention is involved.[242] In the middle, courts suggest, but have not held, that passive leaking from tanks could be disposal and leave some uncertainty as to whether and when they might require active human involvement.[243]

a. Gradual Passive Spreading Does Not Constitute Disposal

While many courts have addressed the meaning of disposal under CERCLA, a careful reading reveals that no circuit court has held that the mere gradual passive spreading of contaminants (*e.g.,* passive migration through soil or groundwater) constitutes disposal.[244] Indeed, the Second, Third, and Ninth Circuits have expressly held that it does not. In *United States v. CDMG Realty*, the Third Circuit addressed whether migration of landfill contaminants constitutes disposal under CERCLA §107(a)(2).[245] Assuming, but not deciding, that leaking and spilling could cover passive actions, the court nonetheless concluded that leaking and spilling mean something different than gradual spreading of landfill contaminants.[246] Leaking, for example, "would encompass the escape of waste through a hole in a drum."[247] "Spill" means a "rapid torrent, not gradual passive migration over the course of several years."[248] Thus, the Third Circuit concluded gradual spreading of

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differing interpretation of "disposal" under CERCLA); *see also* Scott, *supra* note 239, at 986–88 (arguing for "disposal" to involve human conduct for purpose of BFPP defense).

241 *See infra* section IV.A.1.b.

242 *See* Scott, *supra* note 239, at 982–83; *infra* section IV.A.1.c.

243 *See infra* text accompanying notes 272–78.

244 The Fourth Circuit is often cited as taking the broadest view of "disposal" as encompassing passive migration. *See, e.g.*, Braun, *supra* note 240, at 58 (citing Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992); Crofton Ventures Ltd. v. G&H P'ship, 258 F.3d 292 (4th Cir. 2001)); Scott, *supra* note 239, at 980 (citing Nurad, 966 F.2d at 845; Crofton Ventures Ltd., 258 F.3d 292 (4th Cir. 2001)). Both cases, however, dealt with leaking tanks and drums, and to that extent, the court's holding in those cases was consistent with the cases that limit "disposal" to passive migration from containment. *See infra* text accompanying notes 272–78. In *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 177 (4th Cir. 2013), where the context was spreading contaminated soils during earth-moving and construction activities, the Fourth Circuit cited the *Nurad* dictum as "interpreting 'disposal' broadly to include passive acts, such as leaking and spilling."

245 United States v. CDMG Realty, 96 F.3d 706, 714–15 (3d Cir. 1996).

246 *Id*. at 714.

247 *Id.*

248 *Id.*

landfill contaminants does not amount to "spilling" or "leaking." Therefore, it does not constitute "disposal."[249]

The court went on to contrast CERCLA's definitions of "disposal" and "release,"[250] noting that "release" includes the term "leaching" but "disposal" does not.[251] "Leaching" is the term "commonly used in the environmental context to describe the migration of contaminants."[252] Based on the contrasting definitions of "disposal" and "release," the court concluded that Congress was aware of the concept of passive migration and explicitly included "leaching" within the scope of "release" and not "disposal."[253] Thus, the court held that "movement of contaminants does not constitute 'disposal.'"[254]

One year later, the Second Circuit agreed with the Third Circuit, holding in *ABB Industrial Systems, Inc. v. Prime Technology, Inc.*[255] that "although hazardous chemicals may have gradually spread underground while the dismissed defendants controlled the property (passive migration), we conclude that prior owners are not liable under CERCLA for passive migration."[256] The Ninth Circuit in *Carson Harbor Village, Ltd. v. Unocal Corp.*,[257] relying on the Third Circuit's reasoning in *CDMG Realty*, also concluded that gradual spreading did not amount to a disposal under CERCLA §107(a)(2).[258] The court rejected what it described as "the absolute binary 'active/passive' distinction used by some courts" in defining "disposal," adopting instead a case-by-case test that compared the facts at hand against the plain meaning of the terms used in the definition of "disposal."[259] The *Carson Harbor* court noted that "there was some evidence that tar-like material moved through the soil and that lead and/or [petroleum hydrocarbons] may have moved from that material into the soil," but it concluded that this gradual spreading could not be described by any of the terms defining "disposal."[260] The court added that it was careful to avoid an interpretation of "disposal" that would essentially negate the ILO

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249 *Id.*
250 *Id.* at 714–15.
251 *Id.* at 715.
252 *Id.*
253 *Id.*
254 *Id.* at 718.
255 120 F.3d 351, 354 (2d Cir. 1997).
256 *Id.* at 354.
257 Carson Harbor Village, Ltd. v. Unocal Corp. 270 F.3d 863 (9th Cir. 2001) (en banc).
258 *Id.* at 879.
259 *Id.* ("[W]e must examine each of the terms in relation to the facts of the case and determine whether the movement of contaminants is, under the plain meaning of the terms, a 'disposal.'").
260 *Id.*

defense[261] and chose instead to interpret the term in a manner that "preserves the scope and the role of the defenses established by Congress."[262]

b. Passive Leaking from Tanks and Drums May Constitute Disposal

Unlike the gradual spreading cases, some courts indicate that passive leaking from tanks or drums can be "disposal." In an opinion characterized as the "bedrock case" on passive migration for defining "disposal" under CERCLA §107(a)(2), [263] the Fourth Circuit in *Nurad* focused on leaking tanks and concluded that mineral spirits leaking from underground tanks constituted disposal.[264] The court explained that section 107(a)(2) "imposed liability . . . for ownership of the facility at a time that hazardous waste was spilling or leaking."[265] Evidence of holes in tanks and exactly matching mineral spirits in the soil around the tanks created a presumption of leaking.[266] The prior owners did not point "to anything to overcome the presumption that the leaking" occurred during the prior owners' period of ownership.[267]

The Fourth Circuit supported this conclusion with policy reasoning that focused on the need for CERCLA §107(a)(2) to reach prior owners, as well as the related need for CERCLA to encourage voluntary cleanups by new owners.[268] Prior owners, the court explained, should not be rewarded for indifference to environmental hazards.[269] If prior owners could go free after letting tanks leak, then new purchasers could not recover response costs and this "discourages voluntary efforts at waste cleanup [and] cannot be what Congress had in mind."[270] The Fourth Circuit has reaffirmed this position in later cases.[271]

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261 *Id*. at 882–84.

262 *Id*. at 884.

263 *See* Scott, *supra* note 239, at 981; Braun, *supra* note 240, at 58.

264 Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 840-41, 846 (4th Cir.).

265 *Id.* at 846 (internal quotations omitted).

266 *Id.*

267 *Id.*

268 *Id.* at 845–46.

269 *Id.* at 845.

270 *Id*. at 846. The Third Circuit expressly disagreed with the Fourth Circuit's reasoning that failing to include passive migration in the definition of "disposal" would create a disincentive for voluntary cleanups. United States v. CDMG Realty Co., 96 F.3d 706, 718 n.10 (3d Cir. 1996).

271 Crofton Ventures L.P. v. G&H P'ship, 258 F.3d 292, 297 (4th Cir. 2001) (disposal occurred when contaminants "leaked into the environment from a source on site."); PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 177 (4th Cir.), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013).

Even though the Third and Ninth Circuits rejected a broad theory of passive migration, which would encompass the gradual spreading of contaminants in soil or groundwater as constituting "disposal," both courts left open a limited acceptance of the passive migration theory as applied to leaking containers. In *CDMG Realty*, the Third Circuit suggested that disposal could include leaking through a hole in a drum.[272] In *Carson Harbor*, the Ninth Circuit reasoned that Congress meant the term "leaking" in the definition of "disposal" to refer to leaking barrels or underground storage tanks. [273] It based this reasoning on CERCLA's 1980 legislative history, which described the leaking of abandoned drums from prior owners and polluters at the Love Canal site, which in turn largely prompted the enactment of CERCLA.[274] The court's reasoning stressed the distinction between leaking tanks and drums and the gradual passive flow of contaminants from one property onto another.[275]

The Second Circuit also indirectly suggested that leaking containers could be "disposal" under CERCLA §107(a)(2). In *Niagara Mohawk Power Corp. v. Jones Chemical, Inc.*, the court adhered to its prior holding that gradual spreading of contaminants is not "disposal."[276] In this case, contaminants from a neighboring property's truck washing operation flowed passively across the Niagara Flats property during prior ownership of the property.[277] Citing the dictionary definition of "leak" as being a hole or crack through which water, air, or light escapes, the court explained that "leaking" refers to the passage of a substance into or from "containment." Thus, the court's reasoning directly ruled out "leaking" as covering the flow of contaminants from one property onto another property.[278]

c. One Circuit Rejects Passive Migration as "Disposal"—"Disposal" Requires Human Conduct in the Sixth Circuit

Alone among the circuits, the Sixth Circuit has held that disposal only occurs where human activity is involved, thus rejecting that

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272 *CDMG Realty Co.*, 96 F.3d at 714 n.3.

273 Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 879 (9th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 971 (2002).

274 *Id.* at 881, 885–86.

275 *See id.*

276 Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 178 (2d Cir. 2003) (citing ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 358–59 (2d Cir. 1997)); *Carson Harbor Village*, 270 F.3d. at 879.

277 *Niagara Mohawk Power,* 315 F.3d at 178.

278 *Id.*

passive migration, whether as gradual spreading or leaking tanks, can constitute "disposal." [279] In *United States v. 150 Acres of Land*, the owners inherited a large tract of property only to later learn that hundreds of drums, hidden by dense vegetation, were located within an obscure area of the property.[280] Faced with a cost recovery action brought by the EPA, the owners asserted the ILO defense which, among other things, required that the acquisition have occurred after disposal of hazardous substances.[281] In that context, the court reasoned that because "disposal is defined primarily in terms of active words such as injection, deposit, and placing, the potentially passive words spilling and leaking should be interpreted actively."[282] Thus, the court held that no disposal occurred in the absence of "any evidence that there was human activity involved in whatever movement of hazardous substances occurred at the property.[283]

A year later, in *Bob's Beverage, Inc. v. Acme, Inc.*,[284] the Sixth Circuit reaffirmed its human activity rule but in the context of CERCLA §107(a)(2). There, prior owner defendants had purchased a property, later to learn that waste drums and a contaminated septic system were left behind by a previous owner.[285] The then-current owner alleged that the prior owners had failed to remove contaminants, thereby causing passive migration.[286] The court held that, absent "active human conduct," passive migration does not constitute "disposal."[287]

2. Prior to the Brownfield Amendments, Lower Federal Courts Construed Movement of Contaminated Soils During Site Redevelopment Activities as Constituting "Disposal"

While the circuit courts vary as to whether different passive migration scenarios constitute "disposal," nearly all circuits that have considered the issue have held that disposal occurs when owners actively disperse contaminants, such as during activities like excavation and grading. The only exception occurs when a party engages in soil investigation activities contemplated by CERCLA, such as pre-acquisition due diligence. Even if there is some contaminant dispersal,

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279 *See* United States v. 150 Acres of Land, 204 F.3d 698, 706 (6th Cir. 2000).
280 *Id.* at 701.
281 *Id.* at 704.
282 *Id.* at 706.
283 *Id.*
284 264 F.3d 692, 697–98 (6th Cir. 2001).
285 *Id.* at 694–95.
286 *Id.* at 697.
287 *Id.* at 697–98 (citing *150 Acres of Land*, 204 F.3d at 704).

the party will not be held liable if the investigation is conducted in a non-negligent manner.[288]

This line of active dispersal cases dates back to the 1988 case of *Tanglewood East Homeowners v. Charles-Thomas, Inc*.[289] There, the Fifth Circuit held that a "disposal" occurred when the prior owner, a residential developer, filled creosote pools and spread creosote-contaminated dirt during residential development.[290] Although the developer did not commit the initial "disposal," the court reasoned that, in addition to a one-time occurrence, "disposal" can also occur when activities disperse previously disposed contaminants.[291] As the court explained, "there may be other disposals when hazardous materials are moved, dispersed, or released during excavations and fillings."[292]

Four years later, in *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp*.,[293] the Ninth Circuit joined the Fifth Circuit in adopting the "active dispersal" rule, giving it life that continues to endure. In addressing the meaning of "disposal" under CERCLA § 107(a)(2), the *Kaiser Aluminum* court followed the Fifth Circuit's reasoning that "disposal should not be limited solely to the initial introduction of hazardous substances onto property."[294] Rather, "disposal" was given a broad meaning to include subsequent movement, dispersal, or release of hazardous substances during excavation and grading of a development site.[295] Accordingly, *Kaiser Aluminum* held that "disposal" can occur when a development contractor excavated the site for residential development and spread contaminated soil to previously uncontaminated areas of the property.[296]

Subsequent circuit court decisions directly followed *Tanglewood* and *Kaiser Aluminum*. In *Redwing Carriers, Inc. v. Saraland Apartments*, the Eleventh Circuit concluded "that a 'disposal' may occur when a party disperses contaminated soil during the course of grading and filling a construction site."[297] In *Bob's Beverage, Inc. v. Acme, Inc.*, the Sixth Circuit reasoned that disposal occurs where active human conduct

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288 *See infra* section IV.A.3.
289 849 F.2d 1568 (5th Cir. 1988).
290 *Id*. at 1571.
291 *Id.* at 1573.
292 *Id.*
293 976 F.2d 1338 (9th Cir. 1992).
294 *Id.* at 1342.
295 *Id.* (citing *Tanglewood*, 849 F.2d at 1573).
296 *Id.*
297 Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1512 (11th Cir. 1996).

"cause[s] the spread of contamination into or on previously uncontaminated soil or water." [298]

In *United States v. Honeywell Int'l, Inc*., a district court in California relied on *Kaiser* and *Tanglewood* in concluding that site development, excavation, and grading of arsenic-contaminated soil in preparation for a subdivision constituted disposal.[299] The trend continued in *Bonnieview Homeowners Association. v. Woodmont Builders*[300] where the developer had removed contaminated soil from a property of multiple residential lots and then spread the soil to create lawns for these properties.[301] The court held that a disposal had occurred and that the defendants were responsible parties under CERCLA §107(a).[302]

3. Soil Dispersal During Properly Conducted All Appropriate Inquiry Has Been Held Not to Constitute "Disposal"

As the cases summarized above demonstrate, when site activities move contaminated soil or otherwise disperse existing contaminants, courts routinely find a disposal to have occurred for the purpose of CERCLA § 107(a)(2). At least one case, however, provides an exception if the activity that caused the dispersal was in furtherance of some other CERCLA provision and was appropriately performed.

In *United States v. CDMG Realty Co*., the court considered whether a prior owner's soil investigation activities constituted disposal.[303] In that case, the current owner, "HMAT," had previously bought a ten-acre parcel from Dowel. Dowel had purchased this closed landfill property years after landfill operations ended, and it owned the parcel for about six years.[304] Dowel did not deposit waste at the site, [305] but Dowel did perform a soil investigation just prior to selling the property to HMAT.[306] HMAT sought cost recovery from Dowel, alleging Dowel to be an owner at the time of disposal.[307] Dowel countered that it did not engage in any "disposal" during its soil investigation and therefore was not liable under CERCLA § 107(a)(2).[308]

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298 Bob's Beverage, Inc. v. Acme, Inc., 264 F.3d 692, 697 (6th Cir. 2001).
299 United States v. Honeywell Int'l, Inc., 542 F. Supp. 2d 1188, 1199–1201 (E.D. Cal. 2008).
300 655 F. Supp. 2d 473 (D.N.J. 2009).
301 *Id.* at 490.
302 *Id.* at 492.
303 United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996).
304 *Id.* at 711–12.
305 *Id.*
306 *Id.* at 711.
307 *Id*. at 712–13.
308 *Id.* at 712.

Dowel's soil investigation involved nine drill borings, each twelve to eighteen feet into the ground.[309] The borings went through waste materials and into groundwater, and several of the boreholes caved in during testing.[310] The court reasoned that this type of activity could result in dispersal of contaminants.[311] The court further reasoned, citing holdings from the Fifth and Ninth Circuits, that in the ordinary case this type of dispersal would constitute "disposal."[312] Nevertheless, the court distinguished this case from ordinary dispersals and rejected the conclusion that the soil investigation amounted to a disposal.[313]

Soil investigations were not like other dispersal-causing actions, the court concluded, because CERCLA recognizes that soil investigations need to occur. The court reasoned that the ILO defense requires "all appropriate inquiry into the previous ownership and uses of the property" and that "CERCLA clearly contemplates that some soil investigation be allowed to examine contaminated property."[314] The court understood the implications of a blanket rule equating a soil investigation that resulted in a dispersal of contaminants with disposal because the acts required to satisfy the ILO defense would themselves trigger CERCLA liability.[315] The court further recognized that soil investigation aimed at assessing development possibilities and productive property use should not be deterred.[316] However, the court nonetheless recognized that negligent soil investigations could constitute a disposal: "[A] party cannot escape liability for performing a soil investigation negligently and thereby unnecessarily spreading pollution."[317] Thus the court held that "*appropriate* soil investigations—

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309 *Id.* at 711.

310 *Id.*

311 *Id.* at 720.

312 *Id.* at 719 *(citing* Kaiser Alum. & Chem. Corp. v. Catellus Develop. Corp., 976 F.2d 1338, 1342–43 (9th Cir. 1992); Tanglewood E. Homeowners v. Charles-Thomas, Inc. 849 F.2d 1568, 1573 (5th Cir. 1988)).

313 *CDMG Realty*, 96 F.3d at 721.

314 *Id*.

315 *Id*. ("In order to give effect to the [ILO] defense and its requirement that prospective purchasers engage in appropriate inquiry and inspection, an 'appropriate' soil investigation cannot itself trigger CERCLA liability. Otherwise, prospective purchasers who by diligently inspecting for contamination cause the dispersal of any contaminants will find themselves liable for causing a 'disposal.'").

316 *Id*. at 722.

317 *Id*. at 721. The court based the non-negligent exception on provisions in CERCLA it deemed as analogously exempting actions from liability if they were performed non-negligently, such as the exercise of "due care" or non-negligent rendering of care, assistance or advice in accordance with the National Contingency Plan. *Id*. at 721–22 (citing CERCLA §§ 107(b)(3)(a)–(d)(1), 42 U.S.C. §§ 9607(b)(3)(a)–9707(d)(1)).

i.e., those that do not negligently spread contamination—fall outside the definition of disposal."[318]

4. The BFPP Defense Has Been Rejected by Relying on Pre-2002 Case Law in Defining "Disposal," without Considering the Effect of the Brownfields Amendments on the Definition of "Disposal" in the Brownfield Redevelopment Context

While the above cases address whether prior owners were owners at the time of disposal, the district court in the *Ashley II* case addressed whether activities performed by the BFPP defense-seeker and current owner, Ashley II of Charleston LLC ("Ashley"), constituted "disposal."[319] Thus, rather than being confronted with the task, like many courts before it, of interpreting "disposal" under CERCLA § 107(a)(2), the *Ashley II* court addressed the meaning of "disposal" under CERCLA § 101(40)(a)—the requirement in the Brownfields Amendments that a BFPP-seeker show that all disposal occurred before Ashley acquired the site. The *Ashley II* court, however, treated the disposal issue exactly like the many CERCLA § 107(a)(2) cases before it without any recognition in its opinion that the Brownfields Amendments may have affected the precedential force of those earlier CERCLA decisions. [320]

Ashley was a brownfield developer that purchased a former fertilizer-manufacturing site as part of a major redevelopment project.[321] PCS Nitrogen, Inc. ("PCS") and several other prior owners produced fertilizer until about 1972.[322] Over 30 years later, Ashley purchased about 30 acres of the site from two prior owners. As part of its redevelopment effort, Ashley demolished structures but failed to remove the underground portions of those structures, thereby leaving in place cement pads, sumps, trenches and underground pipes.[323] These

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318 *Id.* at 722 (emphasis added) (internal quotation marks omitted).

319 Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 499 (D.S.C. 2011), *aff'd on other grounds*, PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013).

320 *Id.* (citing Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992); Tanglewood E. Homeowners v. Charles-Thomas, Inc. 849 F.2d 1568, 1573 (5th Cir. 1988); Kaiser Alum. & Chem. Corp. v. Catellus Develop. Corp., 976 F.2d 1338, 1342 (9th Cir. 1992); Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1508, 1511–12 (11th Cir. 1996)). On appeal, the Fourth Circuit decided the case on other grounds and did not reach this issue. PCS Nitrogen, Inc. v. Ashley II of Charleston, LLC, 714 F.3d 161 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 514 (2013).

321 *Ashley II*, 791 F. Supp. 2d 431 at 444, 467.

322 *Id.* at 444.

323 *Id.* at 469.

sumps and cement pads had been identified during the pre-acquisition Phase I site assessment as a "recognized environmental condition."[324] To recover cleanup costs, Ashley sued PCS, the prior owner, who in turn sought contribution from Ashley.[325] Ashley, however, claimed that it qualified for the BFPP defense and, therefore, was not a liable party.

The district court rejected Ashley's proffered defense. Although it found that Ashley had properly performed all appropriate inquiry and had otherwise satisfied all but three of the BFPP's "continuing obligation" requirements, it concluded that Ashley did not meet the requirements for a BFPP because (1) it had failed to show that all disposal occurred prior to acquiring the property, (2) it had failed to show that it took reasonable steps to manage releases, and that (3) it had failed to show "no affiliation" with the Holcombe and Fair parties, the prior owners.[326]

On the disposal issue, the court explained, "[t]his element requires Ashley to prove that all disposals of hazardous substances occurred before it acquired the site."[327] It then recited the definition of "disposal" and three disposal cases arising under CERCLA § 107(a)(2). First, it cited *Nurad*, where the court concluded that "disposal" included "spilling" or "leaking" from tanks, even without "active involvement."[328] Next, it cited the active dispersal rule in *Tanglewood* and *Kaiser* to reason that "disposals . . . include times when hazardous materials are moved or dispersed."[329]

Armed with this combination of passive migration and active dispersal cases under CERCLA § 107(a)(2), the court concluded that "[i]t is likely that there were disposals"[330] on the property. It found that (1) "sumps [that] contained hazardous substances, were cracked, and were allowed to fill with rainwater";[331] (2) "there was standing water on the pads and in the sumps, which overflowed with some regularity";[332] (3) "[w]hen the sumps overflowed, the water reached cracks in the pads

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[324] *Id.* at 463. The term "recognized environmental condition" refers to 'the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: (1) due to release to the environment; (2) under conditions indicative of a release to the environment; or (3) under conditions that pose a material threat of a future release to the environment." ASTM, E1527-13 PHASE I PRACTICE, *supra* note 19, §3.2.78, at 8 (italics omitted).

[325] *Id.* at 439–40 (citing CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1)).

[326] *Id.* at 500–03.

[327] *Id.* at 499.

[328] *Id*. (citation omitted)

[329] *Id*. (citations omitted).

[330] *Id*. (emphasis added); *see id*. at 471.

[331] *Id*. at 499.

[332] *Id.* at 471.

and even the edge of the pads";[333] and (4) "Ashley did not test under the concrete pads, sumps, or trench to see if the soil under those structures was contaminated."[334] In sum, the court ruled that Ashley "did not prove that no disposals occurred on the Site after its acquisition. . .."[335] The *Ashley II* court simply treated this case exactly like the pre-2002 cases that dealt with disposal under CERCLA § 107(a)(2) and seemed unaware of the different statutory context or legislative intent for disposal when applying the BFPP defense.

B. The Continuing Obligation to Exercise "Appropriate Care" to Manage Releases Applies to Releases that CERCLA Defines Broadly to Encompass Activities that Also Constitute "Disposals" under Pre-2002 CERCLA Case Law

CERCLA's most fundamental prima facie element for establishing liability requires that a "release" occurred. As discussed earlier, CERCLA defines "release" broadly to overlap with many of the elements in the definition of "disposal," including the term "disposal" itself.[336] Because the meaning of "release" encompasses the meaning of "disposal," any disposal also constitutes a "release."[337] Moreover, as previously noted, because the meaning of "release" extends beyond "disposal" to include "leaching" and "escaping," which "disposal" does not, CERCLA "releases" are not always CERCLA "disposals."[338] As a consequence, in contrast to the differing judicial interpretations of "disposal," courts have uniformly held that passive leaking tanks and active human dispersal constitute "releases."[339]

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333 *Id.*

334 *Id.* at 499.

335 *Id*. Ashley presented expert testimony to support its claim that no disposal of hazardous substances had occurred after purchasing the property, but the court struck the testimony for procedural reasons. It based its holding that "[i]t is likely that there were disposals on the Allwaste property" because of the condition of the sumps and the pad and the assumption that hazardous substances had leaked. *Id*.

336 *See supra* text accompanying notes 225–26.

337 Carson Harbor Village, Ltd. v. Unocal Corp*.,* 270 F.3d 863, 878 (9th Cir. 2001) (en banc) ("release" is broader than "disposal" because "release" includes "disposing"); Westfarm Assocs. Ltd. P'ship v. Int'l Fabricare Inst., 846 F. Supp. 422, 431 (D. Md. 1993), *aff'd*, 66 F.3d 669 (4th Cir. 1995) ("Because the definition of release includes disposal ... the breadth of the latter term translates directly to the former.") (citation and internal quotation marks omitted).

338 *See supra* text accompanying notes 225–26.

339 *See, e.g.,* United States v. 150 Acres of Land, 204 F.3d 698, 705–06 (6th Cir. 2000) (leaking of substances from drums constitutes release); United States v. Chapman, 146 F.3d 1166, 1170 (9th Cir. 1998) (leaking drums constitutes release); United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1351 (N.D. Ill. 1992) (passive leaking and leaching from barrels qualifies as a release but not as disposal); United States v. JG-24, Inc., 331 F. Supp. 2d 14, 61–62

Courts also uniformly find the gradual spreading type of passive migration to be a "release." For example, in *Castaic Lake Water Agency v. Whittaker Corp*., the court focused on the term "leaching" and concluded that groundwater contaminants spreading to drinking water wells constituted a "release" under CERCLA because "leaching includes the passive migration of contaminant[s]." [340] The Ninth Circuit in *Pakootas v. Teck Cominco Metals, Ltd*. concluded that slag, which had settled upon river banks as it passively sat and leached, constituted a "release."[341] As it explained, "the passive migration of hazardous substances into the environment from where hazardous substances have come to be located is a *release* under CERCLA."[342]

Other circuit courts agree that gradual spreading constitutes a "release." In *CDMG Realty*, the Third Circuit described leaching of contaminants from landfills as constituting a "release."[343] The Second Circuit agreed in *ABB Industrial Systems v. Prime Technology, Inc*.[344] In *Westfarm Assocs. v. Wash. Suburban Sanitary Commission*, the Fourth Circuit addressed whether leaking of contaminants through cracks in sewer pipes, where another person first released the contaminants into the sewer, constituted a "release."[345] The court explained that the defining terms for "release"—leaking, leaching, and escaping—imply passive conduct; therefore, the passive second release scenario at issue there—leaking through cracks in pipes—also constituted a CERCLA "release."[346]

Most recently, in *Saline River Props., LLC v. Johnson Controls, Inc*., the District Court for the Eastern District of Michigan addressed the

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(D.P.R. 2004) (leaking buried drums constitutes a release); Lewis Operating Corp. v. United States, 533 F. Supp. 2d 1041, 1046 (C.D. Cal. 2007) (actively spreading contaminated soil is a release).

340 Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053, 1076–77 (C.D. Cal. 2003).

341 Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1075 (9th Cir. 2006).

342 *Id*. (emphasis added). *See also* A&W Smelter & Refiners v. Clinton, 146 F.3d 1107, 1111 (9th Cir. 1998) (wind-blown contaminants constitute a "release"); Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1113 (D. Idaho 2003) (release occurred where existing soil contaminants intermittently leached into water during high water flow periods).

343 United States v. CDMG Realty Co., 96 F.3d 706, 715 (landfill leaching qualifies as release but not as disposal).

344 120 F.3d 351, 358 (2d Cir. 1997) (passive spreading of contaminants after a spill constitutes a release, but not disposal).

345 Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n, 66 F.3d 669, 680–81 (4th Cir. 1995).

346 *Id.* at 680. The court relied on its expansive *Nurad* interpretation of "disposal" and equated the definitions of "disposal" and "release" as both implying passive conduct. *Id.* (citing Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992)).

release issue in the context of a brownfield redevelopment.[347] The issue was whether Saline, the brownfield purchaser, caused a "release" by removing a concrete slab above contaminated soil, thereby "allow[ing] additional rainwater into the ground that the building and slab might have partially diverted."[348] After reciting the definitions for both "release" and "disposal," the court first explained that, under Sixth Circuit precedent, passive migration does not constitute "disposal" but, instead, requires human involvement.[349] It went on to distinguish the term "release" from the more narrowly defined "disposal" to explain that passive migration, even if not a "disposal," could still constitute a "release."[350] Ultimately, the court found that Saline's activities involved more than just passive migration and thus given the evidence of possible human involvement, Saline's actions would be held to be both a "disposal" and a "release."[351]

C. The Post-Acquisition Ban on "Disposal" Can Be Harmonized with the Continuing Obligations to Exercise "Appropriate Care" for Managing "Releases"

Redevelopment of brownfield properties will almost inevitably result in post-acquisition spreading of contaminated soils. Additionally, brownfield redevelopment will often involve sites where existing releases continue to passively migrate (e.g., leaking tanks). Lower federal courts, however, have characterized both spreading of contaminated soil[352] and certain types of passive migration[353] as "disposal" of hazardous substances, generally in CERCLA § 107(a)(2) cases. If courts adhere to these interpretations of "disposal" when addressing claims of BFPP or ILO liability protection, virtually no brownfield redeveloper will qualify for these defenses because the defenses require a showing of no "disposal" of hazardous substances after acquiring the property. In the case of spreading soil during redevelopment, developers will lose the defenses by undertaking the

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347 Saline River Props., LLC v. Johnson Controls, Inc., 823 F. Supp. 2d 670, 683–84 (E.D. Mich. 2011).

348 *Id.* at 683 (internal quotation marks omitted).

349 *Id.* at 684 (citations omitted).

350 *Id.* ("Even where there is not human activity involved in the movement of hazardous substances on a property, there can still be a release.") (citations and internal quotations omitted).

351 *Id*. Saline's attempt to establish BFPP status failed because it offered no evidence as to any of the BFPP elements. *See id*. at 686. Nevertheless, even if Saline could show that it took "reasonable steps" as to the releases and otherwise met the BFPP defense elements, its failure to demonstrate no disposal would doom the defense.

352 *See supra* section IV.A.2.

353 *See supra* section IV.A.1.

very actions that Congress intended to promote—restoring brownfield properties to economic productivity. In the case of passive migration, this could become an insurmountable impediment to qualifying for the defenses from the moment of acquiring the property since preexisting migration will not magically cease when title to the property passes to the new owner.

District courts are understandably reluctant to depart from prior appellate court interpretations of the statutory term "disposal," even when those interpretations were in the context of CERCLA § 107(a)(2). But that is precisely what these courts must do if the Brownfields Amendments are to achieve the congressional aim of redeveloping abandoned brownfield properties.[354] Courts are not bound to interpret "disposal" for the purpose of adjudicating the defenses in the Brownfields Amendments in the same way as "disposal" has been interpreted under CERCLA § 107(a)(2). The Brownfields Amendments liability defenses and § 107(a)(2) serve fundamentally different purposes. Instead, by harmonizing the term "disposal" with the companion provisions for managing post-acquisition releases, courts can achieve the congressional aims of the Brownfields Amendments without undermining the precedential significance of "disposal" case law in CERCLA § 107(a)(2) litigation.

1. Identical Statutory Terms Appearing in Separate Provisions of the Same Statute May Require Different Interpretations Depending on the Statutory Context

Dating back to 1932, the Supreme Court held in *Atlantic Cleaners & Dyers, Inc. v. United States* that courts can give different interpretations to identical statutory terms that appear in separate statutory sections where the context indicates a different congressional intent.[355] In *Atlantic Cleaners & Dyers, Inc.*, defendants argued that "trade or commerce" in section 3 of the Sherman Act[356] should be interpreted the same as "trade or commerce" in section 1 of that Act;[357] therefore, their local dry cleaning operation did not constitute "trade or commerce."[358] The Supreme Court disagreed. The Court allowed for an interpretation that varied between section 1 and section 3, and in doing so it explained

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354 *See supra* text accompanying notes 2, 11, 25–33.
355 Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 433 (1932).
356 15 U.S.C. § 3.
357 15 U.S.C. § 1.
358 *Atlantic Cleaners & Dyers*, 286 U.S. at 432–33.

that the varied interpretation should be guided by the legislative intent.[359]

According to the Court, "[m]ost words have different shades of meaning and consequently may be variously construed . . . when used more than once in the same statute or even in the same section."[360] Despite a "natural presumption" that the same words used in the same statute have an identical meaning, that presumption must yield when the "connection in which the words are used" shows that they were "employed in different parts of the act with different intent."[361] The Court concluded that it was free to interpret the two sections as though they were separate and independent acts.[362]

In 2007, the Supreme Court expanded the *Atlantic Cleaners & Dyers* reasoning to defined statutory terms.[363] The Court addressed the meaning of the identically defined term "modification" as used in two separate sections of the Clean Air Act.[364] One section imposed air pollution performance standards for "modifications" to existing air pollution-emitting facilities.[365] Another section imposed prevention-oriented permit requirements to provide added protection in certain parts of the country, also for the case of "modifications" to existing facilities.[366] EPA had interpreted the term "modification" differently in its implementing regulations under each of these two statutory sections.[367]

Relying on *Atlantic Cleaners & Dyers*, the Supreme Court in *Duke Energy* approved these varied interpretations and rejected the Fourth Circuit's conclusion that there was an irrebuttable presumption that the same defined term—"modification"—must be identically construed when used in different sections of the same statute.[368] The Court concluded that there is "no effectively rebuttable presumption that the same defined term in different provisions of the same statute must be interpreted identically."[369] In other words, the principle of *Atlantic*

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359 *Id.* at 433.

360 *Id.*

361 *Id.* ("We are, therefore, free to interpret §3 disassociated from §1 as though it were a separate and independent act").

362 *Id.* at 435.

363 Envtl. Def. v. Duke Energy Corp., 549 U.S. 561, 574 (2007).

364 *Id.* at 565–66, 568.

365 *Id.* at 566–67 (citing Clean Air Act § 111(a)(4), as amended, 42 U.S.C. § 7411(a)(4)).

366 *Id.* at 568 (citing Clean Air Act § 169(2)(C), as amended, 42 U.S.C. § 7479(2)(C)).

367 *Id.* at 567 (citing 40 C.F.R. § 60.14 (1976)); *id*. at 568–69 (citing 40 C.F.R. § 51.166(b) (1987)).

368 *Id*. at 574–76.

369 *Id.* at 575–76 (internal quotations omitted).

Cleaners applies "even when the [terms] share a common statutory definition."[370] At their core, *Atlantic Cleaners* and *Duke Energy* stand for the proposition that "[c]ontext counts" in construing the same term in different parts of the same statute.[371] These Supreme Court cases establish that courts should interpret defined statutory terms differently from one section to the next when the statutory context and the legislative purpose warrant varied interpretations.[372]

2. "Disposal" Appearing Under Separate Provisions of CERCLA Can Be Interpreted Differently Because of the Statutory Context, Allowing the Post-Acquisition Ban on "Disposal" to Operate in Harmony with the Post-Acquisition Requirement to Exercise "Appropriate" Care for Managing "Releases"

The BFPP and ILO requirement that no "disposal" occur following property acquisition strongly suggests that "disposal" cannot have the same meaning in the context of these defenses as numerous lower courts have used the term in CERCLA § 107(a)(2) cases. Otherwise, the congressional aim of promoting brownfields redevelopment could never be achieved.[373]

A workable interpretation of "disposal" is suggested by the Third Circuit's "appropriate" soil investigation analysis in *CDMG Realty*.[374] Similar to *CDMG Realty's* exclusion of appropriately performed soil investigations from "disposal" under CERCLA § 107(a)(2), the meaning of "disposal" under the Brownfields Amendments should be interpreted to exclude any passive migration or active dispersal that may have nonetheless occurred during brownfield redevelopment, as long as defense seekers exercised "appropriate care" by taking "reasonable

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370 *Id.* at 574 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 342–44 (1997)). In *Robinson*, the Supreme Court was faced with the question of whether the term employee, as defined in Title VII of the Civil Rights Act, should be interpreted to include former employees or only current employees. 519 U.S. at 339. With language that the *Duke Energy* Court later quoted, that Court explained "each section must be analyzed to determine whether the statutory context gives the term [employee] a further meaning that would resolve the issue in dispute." *Id.* at 343–44.

371 *Envtl. Def.*, 549 U.S. at 576.

372 *Accord*, Util. Air Reg. Grp., v. EPA, 573 U.S. ___, 134 S. Ct. 2427, 2441 (2014) ("[T]he presumption of consistent usage readily yields to context, and a statutory term—even one defined in the statute—may take on distinct characters from association with distinct statutory objects calling for different implementation strategies." (quoting *Envtl. Def.*, 549 U.S. at 574)) (internal quotation marks omitted); King v. Burwell, 576 U.S. ___, 135 S. Ct. 2480, 2493 n.3 (2015).

373 *See* Strickland, *supra* note 232, at 798 ("A continued broader interpretation of 'disposal' would likely compromise the usefulness of the BFPP exemption in the promotion of brownfield development, because prospective purchasers would be exposed to liability simply by developing the site—the whole goal of the Brownfields Act.").

374 *See supra* section IV.A.3.

steps" to halt or minimize exposure to contamination in performing site redevelopment activities.[375]

Under this interpretation, courts would apply a two-step inquiry in cases involving the BFPP or ILO defenses. First, courts would determine whether a post-acquisition "disposal" had occurred under applicable § 107(a)(2) precedents. If in step one the court found that since the defense seeker had acquired the property there had been (1) no new disposal of hazardous substances, (2) no passively leaking tanks, and (3) no active dispersal via site development activities occurred, the court could conclude that no disposal of hazardous substances had occurred during the defense seeker's ownership of the property and the inquiry would end there. If, however, the court determined that a §107(a)(2) disposal had occurred, the court would proceed to the second step of the inquiry, as in *CDMG Realty*, and ask whether the 107(a)(2) disposal activity was conducted non-negligently and therefore appropriately for redeveloping a brownfield property. Appropriateness in such a case would be equated with the statutory continuing obligation for managing "releases"—i.e., whether the property owner had exercised "appropriate care" by taking "reasonable steps" to halt or minimize exposure to the contamination.[376] Thus, if the CERCLA defense seeker has satisfied the obligation to take "reasonable steps" to manage releases, any passive migration or active dispersal that nonetheless occurred would not constitute a prohibited post-acquisition "disposal."

This interpretation, for example, would allow brownfield purchasers to preserve the defense while undertaking site redevelopment even if it involved some movement of contaminated soil (if that redevelopment was performed responsibly) and would afford purchasers reasonable time to remove leaking tanks or drums without being deemed to have caused a "disposal." This interpretation is also supported by the statutory canon that the specific governs the general. The Supreme Court recently explained this canon as one which ordinarily interprets a specific statutory provision as an exception to a general prohibition or permission, and further noted that applying the canon is particularly appropriate where "Congress has enacted a comprehensive scheme and

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375 This is the statutory standard in the Brownfields Amendments for managing releases. *See* CERCLA §§ 101(35)(B)(i)(II), (40)(D), 107(q)(1)(A)(iii), 42 U.S.C §§ 9601(35)(B)(i)(II), (40)(D), 9607(q)(1)(A)(iii). *See infra* section IV.D (analyzing case law on "appropriate care" and "due care" standards).

376 *See* CERCLA §§ 101(35)(B)(i)(II), (40)(D), 107(b)(3), (q)(1)(A)(iii), 42 U.S.C. § 9601(35)(B)(i)(II), (40)(D), 9607(b)(3), (q)(1)(A)(iii).

has deliberately targeted specific problems with specific solutions."[377] In the case of the Brownfields Amendments, the BFPP and ILO defenses set a general prohibition that bans all disposal after property acquisition; however, the Brownfields Amendments also specifically direct the property owner to exercise "appropriate care" in managing "releases." Because every disposal is, by definition, also a release,[378] the requirement to exercise "appropriate care" to manage "releases" equally applies to "disposals;" therefore, the obligation to exercise "appropriate care" for "releases" (and therefore "disposals") can be most plausibly interpreted as being an exception to the general prohibition of post-acquisition "disposal." Under the general/specific canon, therefore, the requirement for managing releases governs over the general ban on post-acquisition disposal.

While not expressly incorporating the two-step inquiry suggested above, a California district court seemed to employ similar logic by basing the success of a BFPP's defense on the appropriateness of managing releases rather than focusing on whether a disposal may have occurred. In *3000 E. Imperial, LLC v. Robertshaw Controls Co*., the court first held that the prior owner committed a disposal under CERCLA § 107(a)(2) because, during its ownership, underground tanks leaked trichloroethylene into the environment.[379] When the BFPP-seeker subsequently purchased the property, the same tanks remained in place for about a year after which the BFPP-seeker sampled and emptied them. Even though the court had found that these same leaking tanks constituted a disposal during the prior ownership, the court neither queried nor addressed whether the BFPP-seeker committed a disposal after acquisition.[380] Rather, the court went straight to the question of whether the BFPP-seeker's post-purchase management of the tanks qualified as "reasonable steps to prevent [a] further release of hazardous substances. . .."[381] The court ultimately held that the defense seeker took

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377 Radlax Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. ___, 132 S. Ct. 2065, 2070–71 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.") (citing Morton v. Mancari, 417 U.S. 535, 550–51 (1974); quoting Varity Corp. v. Howe, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting)); *see* HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) (per curiam) (The canon applies particularly when two provisions are interrelated and closely positioned as parts of the same statutory scheme).

378 *See supra* text accompanying notes 221–26.

379 3000 E. Imperial, LLC v. Robertshaw Controls Co., No. CV 08-3985 PA, 2010 U.S. Dist. LEXIS 138661, *19 (C.D. Cal. Dec. 29, 2010).

380 *Id.* at *32–*35.

381 *Id.* at *35.

reasonable steps and thus qualified for BFPP status.[382] Even though the court did not discuss whether the tanks caused either a disposal or a release after the property acquisition, the court reached a harmonizing result by going straight to the appropriateness of the BFPP's release management steps and concluded that the BFPP appropriately managed the release.

The contrasting statutory context for disposal in § 107(a)(2) and the separate Brownfields Amendments sections of CERCLA support this harmonizing interpretation in applying the latter amendments. Section 107(a)(2) does not include any balancing requirement for managing releases. Rather, it solely addresses disposal as the activity that results in liability. Because of this statutory context, courts interpreted § 107(a)(2) liberally in light of the intent of CERCLA to impose cleanup costs on those responsible[383] and to avoid rewarding indifference or malfeasance on the part of prior owners.[384] These policy underpinnings, however, do not apply in the brownfields context. The BFPP and ILO statutory provisions show a different, even opposite, legislative purpose. The principal aim of the Brownfields Amendments, as previously described, is to promote redevelopment of brownfields properties conditioned on a specific set of flexible environmental goals below the level of a full CERCLA remediation.[385] These provisions, among other things, provide a safe harbor from CERCLA liability where brownfield purchasers show that, after acquiring a property, they satisfied the continuing obligations spelled out in the amendments, including taking reasonable steps with respect to prior, threatened, or continuing releases.[386]

The threat to achieving the congressional purpose stems from activities that fall within the definitional overlap of "disposal" and "release," at least as some circuits have construed the term "disposal." Under this overlapping definitional scheme, every "disposal" would also constitute a "release."[387] The Brownfields Amendments specifically address the required response for releases by requiring reasonable performance goals for managing releases.

This statutory context calls for a reading of "disposal" that works in harmony with the requirement to manage "releases" and does not

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382 *See infra* text accompanying note 474–82.

383 *See* Scott, *supra* note 239, at 984–86 (citing cases that construed "disposal" liberally to achieve CERCLA's original legislative purpose).

384 See *supra* text accompanying notes 268–69.

385 *See supra* text accompanying notes 2, 25–28, 34.

386 *See supra* section II.D.

387 *See supra* text accompanying note 338.

expunge the liability protections offered to purchasers who take "reasonable steps" for managing releases. If not read in this harmonizing way, every post-acquisition disposal (all of which, as noted above, also constitute releases) would automatically cause the brownfield purchaser to lose the defense, making the "reasonable steps" requirements meaningless. The BFPP defense contemplates that releases may occur at a property purchased by BFPP defense seekers without jeopardizing the purchaser's eligibility for the defense. Manifestly, the very existence of the requirement to take reasonable steps as to releases, in lieu of a blanket requirement for full cleanup or a strict requirement to stop every release, demonstrates this. By imposing a reasonableness standard for managing releases, Congress signaled that the eligibility for the defense must be determined not by whether the property owner's action was successful, but whether, in light of the facts and circumstances at the property, the steps taken were reasonable.[388]

These "reasonable steps" requirements do not prohibit or foreclose the possibility that disposal—including leaking tanks or active dispersal—could occur. If "disposal" were interpreted as it has been under § 107(a)(2), appropriate management of releases could become irrelevant because the disposal prohibition would broadly sweep the BFPP defense away from purchasers even when they took all required "reasonable steps." In short, the very act of taking "reasonable steps" involves activities that could be characterized as "disposal." Congress could hardly have intended such a self-defeating result in a statute with the dual aims of promoting restoration of brownfields properties and cleaning up abandoned or neglected contaminated properties.[389] Courts

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[388] *See infra* section IV.D.

[389] *See* United States v. CDMG Realty Co., 96 F.3d 706, 716 (3d Cir. 1996) ("Because CERCLA conditions the innocent owner defense on the defendant's having purchased the property after the disposal of hazardous waste at the property, disposal cannot constitute the allegedly constant spreading of contaminants. Otherwise the defense would almost never apply, as there would generally be no point after disposal. . . . We think it unlikely that Congress would create a basically useless defense.") (internal quotation marks and citations omitted); *see also id*. at 721 ("In order to give effect to the [ILO] defense and its requirement that prospective purchasers engage in appropriate inquiry and inspection, an appropriate soil investigation cannot itself trigger CERCLA liability. Otherwise, the prospective purchasers who by diligently inspecting for contamination cause the dispersal of any contaminants will find themselves liable for causing a disposal. And the [ILO] defense would offer such prospective purchasers no protection. . . .") (internal quotation marks omitted); Carson Harbor Village, Ltd. v. Unocal Corp. 270 F.3d 863, 882 (9th Cir. 2001) (en banc) (avoiding interpretation of "disposal" that "would render the [ILO] defense either impossible to present or entirely superfluous").

eschew interpretations that would render a statute ineffective or a nullity.[390]

The legislative purpose of the Brownfields Amendments also supports the harmonizing interpretation of "disposal" suggested in this article. During Senate floor debate where the liability provisions of the Brownfields Amendments originated, several critical objectives were widely acknowledged. Senator Lieberman succinctly stated the problem that the legislation is aimed at resolving: "Developers fear the potential liability risks involved in developing a site laden with unknown chemicals."[391] Senator Smith, the committee chairman and floor manager of the bill, reiterated that concern; developers fear that if they come on the property to cleanup contamination, they would assume any existing liability—a risk they are unwilling to take.[392] Senator Crapo, speaking for a number of his colleagues, stressed that the legislation not simply set up a new approach for restoring brownfields properties, but that to be successful it must remove the preexisting CERCLA impediments to brownfields redevelopment and not create new ones.[393] The aim of the legislation, as Senator Crapo explained, is to "ensure that developers are confident that their involvement will be truly welcomed and they will not simply pick up the liabilities already facing those who own the brownfields and work on the properties."[394]

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390 *See*, *e.g.*, King v. Burwell, 576 U.S. ___, 135 S. Ct 2480, 2492-93 (2015) (rejecting interpretation that would result in the condition that the statute was intended to prevent) (citing New York State Dept. of Social Services. v. Dublino, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.")); United States v. Quality Stores, Inc., 572 U.S. ___, 134 S. Ct. 1395, 1401 (2014) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." (quoting Stone v. INS, 514 U.S. 386, 397 (1995))); United States v. Castleman, 572 U.S. ___, 134 S. Ct. 1405, 1419 (2014) (Scalia, J., concurring in part and concurring in the judgment) (referring to a "presumption against ineffectiveness—the idea that Congress presumably does not enact useless laws); Bilski v. Kappos, 561 U.S. 593, 607–08 (2010) (rejecting interpretation of statutory provision that would render another section of the same statute meaningless).

391 147 CONG. REC. 6242 (2001).

392 *Id.* at 6235 ("That has been the problem to date … [t]hey cannot do it because they will be held liable so they say, fine, we are not going to go on the site and clean it up and take the risk"); *see also id*. at 6251 ("For so many years, under the current Superfund law, they have not been able to develop these sites because industry and contractors simply would not take the risk, knowing the possible liability.").

393 *Id*. at 6246. ("[I]f we do a brownfields bill, we need to do one that truly works and not simply create another approach to the issue that runs into the same problems we have dealt with under the Superfund statute for so many years. In other words, we need to craft it so the effort to reclaim these areas and make them green again is not a failure and we don't simply pass legislation that creates another set of difficult, burdensome approaches to the issue.").

394 *Id*.

Senator Boxer, the ranking member of the subcommittee that drafted the bill, summed up the bill's primary focus when she stated that "[t]his bill includes liability relief for innocent parties."[395] She identified these innocent parties as

> people who are interested in cleaning up the brownfield site, but they are afraid to get involved because they may become liable for somebody else's mess. *Our bill makes it clear that innocent parties will not be held liable under Superfund for the work they do on a brownfield site*. This provision alone should help reduce the fear of developers and real estate interests, and it should lead to more cleanups.[396]

In sum, the legislative purpose supporting the Brownfields Amendments' defenses seeks to free brownfield purchasers from liability when they responsibly redevelop and put contaminated properties back into use. This stands in sharp contrast to the legislative purpose of § 107(a)(2), which sought to establish broadly sweeping liability. There is nothing in any of the legislative materials to suggest that Congress intended CERCLA's original broadly sweeping liability regime to apply in the brownfields context. Rather, the legislative materials state unequivocally that the aim of the amendments is to remove the preexisting liability impediments to brownfields redevelopment.[397]

D. Taking "Appropriate Care" to Manage Releases During Brownfields Redevelopment

If the federal courts adopt this interpretive two-step approach for defining "disposal" in the brownfields context, the property owner seeking to qualify for the BFPP defense will need to focus on satisfying "appropriate care" standards for site redevelopment activities. As this subsection demonstrates, steps that would qualify as "appropriate care" are fact-based and should focus on the need to protect persons from exposure, to prevent exacerbating existing conditions, and to report to and cooperate with regulatory authorities. Site redevelopment can occur while meeting the "appropriate care" standard, and when this standard is met, activities that might otherwise be construed as "disposal" under CERCLA § 107(a)(2) should not cause defense seekers to forfeit eligibility for liability protection.

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395 *Id.* at 6241.

396 *Id*. (emphasis added).

397 *See supra* text accompanying notes 391–96.

As noted earlier, the Brownfields Amendments state that exercising "appropriate care" means taking "reasonable steps" to stop and prevent releases and to limit exposure to released hazardous substances.[398] This "appropriate care" and "reasonable steps" language appeared for the first time in 2002 with enactment of the Brownfields Amendments.[399] The "appropriate care" language appears only in the BFPP section,[400] while the "reasonable steps" language is an express precondition for all three categories of property owners seeking to qualify for CERCLA liability protection.[401] The two phrases become linked in the BFPP section where Congress specifically defined exercising "appropriate care" as "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."[402]

Thus, without restating the "appropriate care" language in the ILO and CPO sections, Congress incorporated the "appropriate care" standard into those two provisions by using the same "reasonable steps" language that the BFPP section had equated with "exercis[ing] appropriate care."[403] The Senate committee that initiated the amendments explains that typical "reasonable steps" could include (1) erecting and maintaining signs or fences to prevent public exposure, (2) maintaining existing barriers or other elements of a response action, and (3) notifying appropriate Federal, State, and local officials regarding the situation.[404]

These "reasonable steps" guideposts demonstrate that brownfields redevelopment can occur while satisfying the "reasonable steps" condition. These guideposts can be plausibly interpreted to mean, for example, that when brownfields redevelopment occurs, steps taken during site development to prevent public exposure (e.g., erecting fences), to maintain elements of any existing response action (e.g., not damage existing physical measures in place such as "caps" or remediation apparatus), and to work in consultation with environmental

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398 *See* CERCLA §§ 101(35)(B)(i)(II), (40)(D), 107(a)(1)(A)(iii), 42 U.S.C §§ 9601(35)(B)(i)(II), (40)(D), 9607(a)(1)(A)(iii); *supra* text accompanying note 71.

399 CERCLA § 101(35)(B)(i)(II), 42 U.S.C. § 9601(35)(B)(i)(II) (ILO); i*d.* § 101(40)(D), 42 U.S.C. § 9601(40)(D) (BFPP).

400 CERCLA § 101(40)(D), 42 U.S.C. § 9601(40)(D).

401 CERCLA § 101(35)(i)(B)(II), 42 U.S.C. § 9601(35)(B)(i)(II) (ILO); CERCLA § 101(40)(d), 42 U.S.C. § 9601(40)(D) (BFPP); *id*. § 107(q)(1)(A)(iii), 42 U.S.C § 6707(q)(1)(A)(iii) (CPO).

402 CERCLA § 101(40)(D), 42 U.S.C. § 9601(40)(D).

403 CERCLA § 101(40)(D), 42 U.S.C. § 9601(40)(D).

404 S. Rep. No. 107-2, at 11 (2001).

agencies are the types of steps needed to demonstrate "appropriate care" during site redevelopment.

In addition to the examples in the legislative history, EPA's Common Elements Guidance also offers its own view of appropriate "reasonable steps." First, it acknowledges that determining "reasonable steps" is essentially a fact-based, site-specific inquiry.[405] It then provides examples of "reasonable steps," such as (1) maintaining contaminant migration controls (e.g., not removing or damaging slurry walls, hydraulic barriers or other controls that limit contaminant migration)[406] and (2) repairing a cap where a prior remedy relied on the cap.[407] EPA also explains that, upon discovery of a previously unknown release, remediation would not typically be required, but containment to stop the release may be a necessary reasonable step.[408] Like the examples in the legislative history, EPA's examples confirm that typical brownfields redevelopment activities can satisfy "appropriate care" standards.

1. The Relationship of "Appropriate Care" Standards with Preexisting "Due Care" Requirements

In addition to the "appropriate care" guideposts discussed above, the body of case law addressing "due care" can prove instructive as to the "appropriate care" needed during site development activities. Taking "due care" has been a requirement of CERCLA's third party defense since CERCLA's enactment in 1980.[409] The third party defense protects those that had nothing to do with a release, so long as they managed the release appropriately. More specifically, those seeking the third party defense must show that (1) the release was caused solely by a third party, (2) the third party was not an employee or agent of the defense seeker, (3) the defense seeker and the third party were not in a contractual relationship, (4) the defense seeker exercised due care with respect to the hazardous substance, and (5) the defense seeker took precautions against foreseeable acts or omissions of the third party.[410] Congress added the innocent landowner defense as a new subcategory

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405 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 11.

406 *Id.*at Attachment B, 2–3.

407 *Id.* at Attachment B, 3.

408 *Id.* at Attachment B, 4.

409 For an overview of the third party defense and "due care" requirements, *see generally* Jeffrey C. Close, *CERCLA's Rock and Hard Place: A Look At the Interpretative Conundrum Created by the Innocent Landowner Defense*, 86 FLA. BAR J. 31 (2012); *see also* Chris Dunsky, *Taking Due Care: How Much Care is Due from a Nonliable Owner under CERCLA and Part 201*, 80 MICH. BAR J. 28 (2001).

410 *See supra* text accompanying note 14.

to the third party defense in 1986 while leaving undisturbed the conditions for qualifying for the defense (including the requirement to exercise "due care").[411] CERCLA itself does not define "due care," [412] but according to the legislative history, a person must demonstrate that its actions were consistent with those that a "reasonable and prudent person would have taken in light of all relevant facts and circumstances."[413]

The preexistence of the "due care" standard raises the question of whether the 2002 Brownfields Amendments intended to equate or associate "appropriate care" requirements with "due care." Given that each of the Brownfields Amendments' defenses uniformly incorporates the "appropriate care" standard through repetition of the "reasonable steps" language,[414] Congress complicated this question by retaining the cross-reference, adopted in 1986, that makes ILO eligibility subject to the "due care" standard.[415] In effect, Congress retained the preexisting "due care" standard while simultaneously incorporating the "appropriate care" standard for the ILO defense seeker. This raises the obvious question: did Congress mean to require compliance with both standards, and if so, does the "due care" standard contemplate something beyond the "appropriate care" standard? The Senate Committee Report does indicate that the ILO must satisfy both the requirements of "reasonable steps" and "due care," but it does not explain what those additional "due care" requirements may be.[416] Or alternatively, did Congress conclude

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411 The ILO defense provides that property purchasers will not be deemed to be in a contractual relationship with sellers if they can show that disposal of hazardous substances occurred before acquiring the property and that they had no reason to know of prior releases after having performed all appropriate inquiries into the prior uses and ownership. *See supra* text accompanying notes 13–17.

412 *See* CERCLA § 101, 42 U.S.C. § 9601.

413 H.R. REP. NO. 96-1016, pt. 1, at 34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6137.

414 *See supra* text accompanying notes 402–03. In contrast to the varying contexts in which the definition of "disposal" arises (*see supra* section IV.A–C), the multiple references to the "appropriate care" obligation through repetition of the "reasonable steps" language for each of the three CERCLA defenses is the classic case for applying the canon that identical terms in multiple parts of a statute are ordinarily given an identical meaning. *See*, *e.g.*, Reno v. Koray, 515 U.S. 50, 58 (1995) (identical terms in different sections of same statute should have same meaning); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 479 (1992) (identifies canon that identical terms in statute bear same meaning).

415 CERCLA § 101(35)(A), 42 U.S.C. § 9601(35)(A) ("[T]he defendant must establish that the defendant has satisfied the requirements of [CERCLA] section 9607(b)(3)(a) and (b)….").

416 S. REP. NO. 107–2, at 13–14 (2001). There is no evidence that Congress viewed the "due care" standard as imposing a standard of care significantly different than the "appropriate care" standard since both appear to view the property owner's actions from the standpoint of the reasonableness of the owner's actions in light of the facts and circumstances. *See supra* text accompanying note 413. Congress may have understood that courts were construing the

that that "due care" and "appropriate care" are substantially identical standards and therefore the redundancy would be of no importance?[417] The legislative materials provide no clue.

Perhaps because of this uncertainty, EPA's Common Element Guidance expresses the view that the "appropriate care" standard is "consonant with traditional common law principles and the existing CERCLA due care requirement."[418] While the EPA guidance reasons that the standards are not identical and that "due care" cases "are not intended to define reasonable steps," it concludes that "existing case law on due care provides a reference point for evaluating the "reasonable steps" requirement."[419] The guidance further provides that, in the case of the BFPP defense seeker, the "reasonable steps" obligations could be more than required for ILO defense seekers because BFPPs gain

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CERCLA defenses narrowly and may have preferred a more generous construction in the new "appropriate care" standard, consistent with the statutory aim of encouraging brownfields revitalization. The legislative history is silent on the question. Nevertheless, there is an additional requirement that the ILO would have to satisfy that does not appear in the BFPP provision. Following the "due care" language, the third party defense also requires the defendant to establish by a preponderance of the evidence that "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." CERCLA § 107(b)(3)(b), 42 U.S.C. § 9607(b)(3)(b).

417 An assumption that the two standards are identical runs up against the anti-superfluous canon. However, the canon is not an ironclad rule of construction. *See*, *e.g*., Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253 (1992) ("[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation…."). Courts sometimes give provisions that seem to duplicate one another identical meanings because legislatures sometimes repeat themselves. *Id*. ("Redundancies across statutes are not unusual events in drafting…."); Microsoft Corp. v. i4i Ltd. P'ship, 564 U.S. ___, 131 S. Ct. 2238, 2249 (2011) ("There are times when Congress enacts provisions that are superfluous.") (internal quotation marks omitted); Loving v. IRS, 742 F.3d 1013, 1019 (D.C. Cir. 2014) ("[L]awmakers, like Shakespeare characters, sometimes employ overlap or redundancy so as to remove any doubt and make doubly sure." (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I,* 65 STAN. L. REV. 901, 934–35 (2013))); Prime Time Int'l Co. v. United States Dep't of Agric., 753 F.3d 1339, 1342 (D.C. Cir. 2014) ("[S]ometimes Congress ... drafts [statutory] provisions that appear duplicative of others ... simply, in Macbeth's words, to make assurance double sure." (quoting Shook v. D.C. Fin. Resp. & Mgmt. Assistance Auth., 132 F.3d 775, 782 (D.C. Cir. 1998))); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 573 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) ("[C]ongressional staff tell us that they will purposely use redundant terms to make sure that all bases are covered…."). In this case, Congress might have chosen to leave the "due care" provision in place because it was part of another provision—the third party defense—that was unaffected by the Brownfields Amendments.

418 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 9 (internal quotations omitted).

419 *Id.* at 11 ("Because the due care cases . . . interpret the due care statutory language and not the reasonable steps statutory language, they are provided as a reference point for the reasonable steps analysis, but are not intended to define reasonable steps.").

knowledge during the all appropriate inquiries process and, in turn, have an opportunity to plan.[420]

The Fourth Circuit in *Ashley II* followed EPA's guidance and concluded that "due care" case law should "inform [the] determination" of "appropriate care" in the BFPP context.[421] The court stated that it was "borrow[ing] standards from CERCLA's due care jurisprudence to inform our determination of what reasonable steps must be taken to demonstrate appropriate care."[422] In reaching this conclusion, the *Ashley II* court rejected the argument that "appropriate care" owed by a BFPP defense seeker should be a lesser standard than "due care" under the ILO and third party defenses.[423] The court particularly focused on the relative obligations of the BFPP as compared to the ILO, and it expressed a view that "appropriate care" required of BFPPs should, if anything, be higher than the "due care" required of ILOs because BFPPs know of contamination at the time of property acquisition, while ILOs do not;[424] however, the court stopped short there and concluded that it need go no further than hold that "appropriate care under §9601(40)(D) [the BFPP defense] is at least as stringent as due care under §9607(b)(3)."[425]

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[420] *Id.* at 11.

[421] PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 180-81(citing EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 9).

[422] *Ashley II*, 714 F.3d at 181.

[423] *Id.* at 180.

[424] *Id.*

[425] *Id.* at 180 (internal quotations omitted) (citing EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 9). The court relied on logic in speculating that "appropriate care" might call for a higher standard of care than "due care" because the BFPP knows of the presence of contamination while the ILO lacks knowledge of any contamination. *Id*. The court appears to have overlooked two factors that may cast doubt on its logic. First, the "due care" and "appropriate care" provisions, although part of the same statute, were enacted at different times and for different purposes. *See supra* text accompanying notes 400, 409–13. The "due care" standard is an integral part of the original CERCLA liability scheme in which defenses are narrowly construed. *See supra* text accompanying note 9; *see*, *e.g*., Reichhold Chem. Inc. v. Textron, Inc., 888 F. Supp. 1116, 1129 (N.D. Fla. 1995) (third party defense is "narrowly construed to effectuate the statute's broad remedial purpose."). Congress added the "appropriate care" language twenty-two years later to overcome the perceived unfairness of liability for certain innocent purchasers of brownfield properties and the disincentives to developing and remediating these properties. *See supra* text accompanying notes 26–30, 34. Congress made clear that remedial actions at these properties are not expected to match the requirements of full CERCLA remedies. *See supra* notes 34–36 and accompanying text; EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 9 ("reasonable steps" provision establishes a lesser response obligation than would apply to a CERCLA liable party). The court's logic takes no account of the congressional purpose of enacting the Brownfields Amendments. Second, although the court was correct that a property owner's "reasonable steps" to address known contamination is likely to be greater than for a property owner lacking such knowledge, the court's compartmentalization of the BFPP and ILO into possession of knowledge in the case of the former and lack of knowledge for the latter is

While the issue has been squarely addressed only by the Fourth Circuit and in EPA guidance, it seems likely that future courts will look to "due care" jurisprudence to inform "appropriate care" evaluations, though they clearly are not bound by them.[426]

2. "Due Care" Case Law Provides Useful Guidance for Exercising "Appropriate Care"

"Due care" cases teach that doing little or nothing when existing contamination is known is insufficient, while taking prudent, affirmative steps can satisfy "due care." Although the "due care" cases are necessarily fact specific, [427] the cases provide instructive guideposts as to the type of steps needed in the brownfields redevelopment context to satisfy the "appropriate care" standard.

a. "Due Care" Found When Timely and Meaningful Steps Are Taken

Two often-cited circuit court opinions found "due care" to exist in cases where the defense seeker had taken timely and meaningful action. In *New York v. Lashins Arcade,* a shopping center purchaser demonstrated "due care" in addressing a dry cleaning spill by taking steps to maintain water filters, sample drinking water, instruct tenants to avoid discharging into the septic system, insert use restrictions into leases, and conduct periodic inspections.[428] In *Redwing Carriers, Inc. v. Saraland Apartments*, the purchaser of an apartment complex approved a plan within three months of gaining ownership to remove tar seeps from the property.[429] The new owners contacted EPA and the state environmental agency when the tar began surfacing,[430] and remediation was implemented within a year as part of an EPA consent order against

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valid only at the time of purchasing the property. An ILO may learn of contamination on the property at a later time, and acquiring this knowledge would not disqualify the ILO from CERCLA liability protection. That is evident from the statutory provision making the "appropriate care" standard uniformly applicable to ILO, CPOs and BFPPs. *Id*. at 10 ("[T]he reasonable steps legal standard is the same for the three landowner provisions."). Moreover, because Congress retained the "due care" requirement for ILOs in addition to meeting the "appropriate care" standard, logic would suggest that Congress may have perceived that the "due care" standard goes beyond the "appropriate care" standard and made this higher level of care applicable solely to the ILO. *See supra* text accompanying note 416

426 *See supra* text accompanying note 426.

427 United States v. Iron Mountain Mines, 987 F. Supp. 1263, 1276 (E.D. Cal. 1997) (citing Lincoln Props., Ltd. v. Higgins, 823 F. Supp. 1528, 1543 (E.D. Cal. 1992)).

428 New York v. Lashins Arcade, 91 F.3d 353, 361 (2d Cir. 1992).

429 Redwing Carriers, Inc. v. Saraland Apts., 94 F.3d 1489, 1508 (11th Cir. 1996).

430 Redwing Carriers v. Saraland Apts., 875 F. Supp. 1545, 1567 (S.D. Ala. 1995).

prior owners.[431] The court also noted that the new owners "did nothing to exacerbate conditions at the site."[432] A number of district courts also found "due care" where the defense seekers took affirmative steps that helped prevent exacerbation or protect persons from exposure.[433]

b. "Due Care" Not Found When No Steps Are Taken

In contrast to the cases where courts found "due care," circuit courts have found no "due care" where defendants took no measures. As one court put it, CERCLA "does not sanction willful or negligent blindness."[434]

In *New York v. Shore Realty Corp.*, Shore Realty acquired the property for land development purposes knowing that existing tenants were operating an illegal storage area and that ongoing leaching of hazardous substances was occurring.[435] Shore Realty claimed the third party defense, arguing, among other things, that it exercised "due care" after taking control of the property. The court rejected the defense, reasoning that Shore Realty knew about the tenant activities but took no steps to stop further dumping by the tenant.[436] Similarly, in *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, the site purchaser knew of contaminants on the site, but made no attempts to remove the

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431 Redwing Carriers, 94 F.3d at 1508.

432 *Id.*

433 Lincoln Props., Ltd. v. Higgins, 823 F. Supp. 1528 (E.D. Cal. 1992) (defendant regularly inspected wells, took tainted wells out of service, and destroyed them to prevent further contamination); Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053 (C.D. Cal. 2003) (upon discovery of groundwater contamination, water agency tested wells, ceased operation of certain wells, notified local agencies, and filed lawsuit against polluting party); City of Emeryville v. Elementis Pigments, No. 3:99-03719, 2001 U.S. Dist. LEXIS 4712, *28 (N.D. Cal. Mar. 6, 2001) (defendants diligently performed environmental remediation after acquiring the property). Major v. Astrazeneca, Inc., No. 5:01-CV-618, 2006 U.S. Dist. LEXIS 65225, *84 (N.D.N.Y Sept. 13, 2006) (taking immediate steps by reporting disposal activities to environmental agency, warning neighbors of potential contamination, hiring an environmental consultant to help assure prior-owner's response action was effective); Interfaith Cmty. Org. v. Honeywell Int'l, Inc., 263 F. Supp. 2d 796, 864 (D.N.J. 2003) (cooperated with the environmental agency, installed site security measures, undertook cleanup, entered into access agreement allowing responsible party access to property); 1325 "G" St. Assocs. v. Rockwood Pigments NA, Inc., No. DKC 2002-1622, 2004 U.S. Dist. LEXIS 19178, *29 (D. Md. Sept. 7, 2004) (complied with environmental agency requests, installed security fence, performed further assessment and investigations).

434 United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988). The "willful blindness" doctrine has a long history in both civil and criminal contexts. *See*, *e.g.*, Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 766-68 (2011) (patent infringement case—noting wide judicial acceptance of doctrine) (citing Spurr v. United States, 174 U.S. 728, 735 (1899) (criminal case)).

435 New York v. Shore Realty Corp., 759 F.2d 1032, 1038–39 (2d. Cir. 1985).

436 *Id*. at 1048–49.

contaminants nor did they take any steps to reduce the environmental threat.[437] In *Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n*, the court held that the Sanitary Commission did not exercise "due care" related to third party spills that traveled into and leaked from the sewer systems because the Sanitary Commission knew of the spills and took no precautions such as mending leaking pipes or banning the discharge of toxics into the sewer system.[438] A number of district court cases have also found no due care where the defense seeker took no action.[439]

c. "Due Care" Not Found Where Some but Insufficient Steps Were Taken

In between the extreme bounds of inaction and meaningful prudent action, some cases involved some but not enough care to qualify as "due care." In *Franklin County Convention Facilities Auth. v. American Premier Underwriters*, the Sixth Circuit addressed the issue of "due care" in a situation where a contractor for a public authority engaged in developing a city owned property and caused a spill of hazardous substances during site development activities that subsequently resulted in contaminant spreading.[440] While constructing a storm sewer line, the contractor accidentally burst open a buried box containing hazardous substances about which the city had no prior knowledge.[441] The authority took immediate action in response, beginning with calling its environmental consultant to the scene to assess the spill. Within days, the authority reported the incident to the Ohio EPA and informed the city.[442] This led to widespread newspaper coverage, public meetings, and an Ohio EPA site assessment.[443] In the months that followed, the authority evaluated the Ohio EPA assessment as well as an options study prepared by its environmental consultant and engaged a

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437 Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994).

438 Westfarm Assocs. v. Wash. Suburban Sanitary Comm'n, 66 F.3d 669, 683 (4th Cir. 1995).

439 *See*, *e.g.,* United States v DiBiase Salem Realty Trust, No. 94-1841, 1993 U.S. Dist. LEXIS 20031, *4, *23 (D. Mass. Nov. 19, 1993) (purchaser did no investigation, did not construct fences, and did not reinforce containment berms after becoming aware of contamination—"no care is not due care"); Foster v. United States, 922 F. Supp. 642, 655 (D.D.C. 1996) (no steps to abate contamination, did not notify regulatory authorities, did not secure access to the site); Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290, 1302 (W.D.N.Y. 1996) (defendant failed to take any affirmative action after discovering contamination).

440 Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, 240 F.3d 534, 539–40 (6th Cir. 2001).

441 *Id*. at 539.

442 *Id*.

443 *Id.* at 539–40.

remediation contractor. When the remediation work began a year after the spill, the contractor discovered that the spill had migrated about forty-five feet into pea gravel that surrounded an underground sewer line.[444] About a month later, the contractor erected a barrier to limit future spreading.[445]

In assessing whether plaintiff met the "due care" standard, the court focused on the fact that the barrier to limit the spread of contamination had not been erected for over a year and more than eight months after the Ohio EPA's assessment noted that the contaminant may have migrated into a seam of the sewer pipe that would allow it to further migrate down the sewer channel.[446] Even though the authority had taken many steps to address the spill, the court focused on the authority's failure to prevent spreading for several months after the state regulatory agency's warning of possible contaminant migration through the sewer channel; therefore, it concluded that the authority had not satisfied the standard of "due care."[447]

In *United States v. Domenic Lombardi Realty*, the defendant raised the ILO defense in response to an action for cost recovery under CERCLA.[448] Although the defendant took some steps to clean PCB-contaminated soil in response to agency orders, the court determined that these steps did not satisfy due care because the defendant left contaminated soil in uncovered piles, did not warn visitors to the property—including tenants—about the contamination, and did not fully obey agency orders.[449]

d. Regulator Notification or Cooperation Is a Key Element in Some Cases

Some cases have particularly focused on the need to cooperate with regulatory agencies. In *United States v. Timmons Corp.,* the defendant purchased contaminated property which later underwent an EPA removal action and, in turn, an EPA cost recovery action.[450] The defendant unsuccessfully asserted the third party defense, alleging that others caused the releases.[451] The court noted that the defendant was

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444 *Id.* at 540.

445 *Id*. at 540, 548.

446 *Id*. at 548.

447 *Id.*

448 United States v. Domenic Lombardi Realty, Inc., 290 F. Supp. 2d 198, 201 (D.R.I. 2003).

449 *Id.* at 211–12.

450 United States v. Timmons Corp., No. 1:03-CV-00951, 2006 U.S. Dist. LEXIS 7642, *2–*12 (N.D.N.Y. Feb. 8, 2006).

451 *Id*. at *37.

three years late in responding to a request by EPA for information and also that the defendant failed to take any action to protect surrounding residents from exposure to contaminants.[452] While taking no protective action was a factor in the court's ruling, the defendant's failure to cooperate with EPA was an important additional consideration.

In *Bob's Beverage Inc. v. ACME, Inc.,* the current property owner, Bob's Beverage, brought a CERCLA cost recovery action against prior owner defendants.[453] The prior owners argued that Bob's Beverage was a potentially responsible party and therefore was limited to a claim for contribution rather than cost recovery.[454] Bob's Beverage responded by asserting the third party defense.[455] The court found that Bob's Beverage knew of groundwater contamination for two and a half years before notifying EPA or the state environmental agency and therefore failed to exercise "due care."[456]

e. Special Case of "Due Care" for Passively Migrating Plumes via Gradual Spreading

At least two courts have considered the issue of "due care" required of property owners where hazardous substances flowed to their property from off-site sources. As in other "due care" cases, the courts focused on whether defense seekers exacerbated conditions and protected persons from exposure. In *Kalamazoo River Study Group v. Rockwell International*, the court addressed the "due care" required of riparian landowners on the Kalamazoo River in Michigan where PCB contamination flowed from upstream sources and contaminated the river banks.[457] The court reasoned that riparian owners exercise "due care" so long as they do not facilitate or encourage the contaminant migration and, once migrated, do not exacerbate the conditions.[458]

In *Castaic Lake Water Agency v. Whittaker Corp.*, perchlorate contamination migrated into the groundwater from the defendants' up-

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452 *Id.* at *40.

453 Bob's Beverage Inc. v. ACME, Inc., 169 F. Supp. 2d 695, 712 (N.D. Ohio 1999).

454 *Id*. The legal argument that potentially responsible parties are ineligible to recover costs under CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), was subsequently rejected by the Supreme Court in United States v. Atlantic Research Corp., 551 U.S. 128, 135–36 (2007).

455 *Bob's Beverage Inc.*, 169 F. Supp. 2d at 713–14.

456 *Id.* at 716.

457 Kalamazoo River Study Group v. Rockwell Int'l, 3 F. Supp. 2d 799, 807 (W.D. Mich. 1998), *rev'd*, Kalamazoo River Study Group v. Menasha Corp., 228 F.3d 648 (6th Cir. 2000) .

458 *Id.* at 808 ("Due care" is met where the "riparian owner has not facilitated or encouraged the migration or spread of the hazardous substance and has not exacerbated the conditions.").

gradient source and reached the plaintiffs' water supply wells.[459] The defendants brought counterclaims, seeking cost recovery and contribution alleging that plaintiffs were also liable parties under CERCLA as owners of contaminated wells.[460] In response, the plaintiffs asserted the ILO defense.[461] On the element of "due care," the court found that plaintiffs tested their wells, removed wells from service, notified local government bodies, participated in numerous meetings with citizen groups and state and federal agencies, and filed the pending lawsuit to obtain the necessary capital for removing the contamination.[462] Based on this evidence, the court determined that the plaintiffs took steps to protect the public from exposure to contamination, and this evidence was sufficient to defeat the defendants' motion for summary judgment.[463]

3. The Few Cases That Have Construed the "Appropriate Care" Obligation Suggest that with Careful Planning the Brownfield Developer Can Satisfy "Appropriate Care" Requirements

Since enactment of the Brownfields Amendments, a few courts have construed the "appropriate care" language. Like the "due care" case law, the "appropriate care" cases focus on protecting persons from exposure to hazardous substances, not exacerbating conditions at the property, and cooperating with regulatory agencies.

In *Voggenthaler v. Md. Square LLC,* the state environmental agency sought cost recovery under CERCLA against the defendant, Maryland Square, which purchased a shopping center; dry cleaning chemicals contaminated the soil and groundwater at this shopping center.[464] Among other things, the defendant claimed it met the BFPP defense,[465] but the Ninth Circuit disagreed. The court reasoned that, "a bona fide prospective purchaser must establish . . . that it . . . took steps to stop any ongoing spill, prevent future spills, and limit the exposure from past spills."[466] It explained that these requirements impose on defense seekers a duty "to prevent further harm."[467] In reviewing the evidence,

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459 Castaic Lake Water Agency v. Whittaker Corp., 272 F. Supp. 2d 1053, 1057 (C.D. Cal. 2003).

460 *Id.* at 1073.

461 *Id.* at 1079.

462 *Id.* at 1083.

463 *Id.* at 1084.

464 Voggenthaler v. Md. Square LLC, 724 F.3d 1050, 1057–58 (9th Cir. 2013).

465 *Id.* at 1061.

466 *Id.* at 1062.

467 *Id.*

the court faulted Maryland Square, which was aware of the contamination, for exposing the contaminated soil to the elements when it demolished the building in which the former dry cleaning business had been operated. Maryland Square, the court explained, identified no steps to remove the contaminated soil or limit the spread of PCE; therefore, according to the court, "[the evidence] do[es] not establish Maryland Square met requirements of [the statute] to prevent further harm, because Maryland Square failed to limit human and environmental exposure to a contamination already present."[468]

In *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, the Fourth Circuit upheld the district court's decision that Ashley, the developer of the brownfield property, failed to exercise "appropriate care." [469] The district court found that Ashley had exposed contaminated sumps to the elements after building demolition and this action may have exacerbated the conditions at the property.[470] Furthermore, the court found that the sumps were identified as a recognized environmental condition during the all appropriate inquiries process,[471] alerting the purchaser to the threat of a release and the need consider preventive action. The district court also faulted Ashley for failing to maintain a limestone rock cover that served to prevent dispersion of contaminated soil and for failing to address a debris pile at the site.[472] The Fourth Circuit affirmed each of these determinations.[473]

In *3000 E. Imperial, LLC v. Robertshaw Controls Co*.,[474] the district court found the brownfield purchaser to have exercised "appropriate care" and, therefore, to have successfully met the requirements of CERCLA's BFPP defense.[475] In this case, about six months after acquiring the property,[476] the new property owner took steps to sample the contents of underground tanks and began working with the state

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468 *Id.*

469 PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 180–81 (4th Cir. 2013). As discussed earlier, the district court also rejected Ashley's claim of BFPP status because Ashley had failed to show that no disposal occurred after acquiring the property. *See supra* text accompanying notes 327–35.

470 Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 501. (D.S.C. 2011).

471 *Id.*

472 *Id.*

473 *Ashley II*, 714 F.3d at 180 ("Ashley failed to clean out and fill in sumps that should have been capped, filled, or removed … and that Ashley did not monitor and adequately address conditions relating to a debris pile and the limestone run of crusher cover on the site.").

474 No. CV 08-3985 PA, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. Dec. 29, 2010).

475 *Id*. at *35. *See supra* text accompanying notes 379–82.

476 The property owner purchased the property on November 30, 2006. *Id.* at *3. Samples of the tank's contents were collected in May 2007. *Id.* at *34.

environmental regulatory agency under its voluntary cleanup program.[477] About four months later, the property owner received information that trichloroethylene ("TCE") had been detected in the samples. This led the owner to have the tanks emptied into drums the following month, which were then removed from the property.[478] Roughly 18 months after emptying the tanks, the property owner removed the tanks from the ground and discovered that water had collected in the tanks, and one tank had an oily layer containing TCE.[479]

Despite the fact that roughly a year and a half had elapsed between the time when the TCE had been discovered and the tanks were removed, the court found that the owner had taken "reasonable steps to prevent the further release of hazardous substances."[480] Although the defendants argued that the property owner should have immediately removed the tanks, the court ruled that, given that the tanks had been emptied, it was "not unreasonable" to have left the tanks in the ground:[481] "It was not unreasonable for [the property owner] to leave the [tanks] in the ground . . . [where] Defendant has not provided any evidence suggesting why Plaintiff would have reason to believe that the USTs were not emptied of TCE."[482]

The steps that qualify as "appropriate care" will vary depending on the specific facts of each case. Nonetheless, the legislative materials, EPA guidance, and judicial precedent under both the "due care" and the post-2002 "appropriate care" lines of cases all point in the same general direction. Purchasers' post-acquisition steps must control the future spread of contamination, not exacerbate site conditions, protect persons from exposure, and take timely reasonable action based on information then available to the property owner. Inaction, willful blindness, or disregard of professional or regulatory technical advice will tend to suggest that a property purchaser fell short of the "appropriate care" standards.[483] Finally, as addressed by the district court in *Ashley II*,

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477 *Id.* at *34–*35.

478 *Id.* at *34.

479 *Id*. at *35.

480 *Id.*

481 *Id.* at *34.

482 *Id*. at *34–*35.

483 *See*, *e.g*., New York v. Shore Realty Corp., 759 F.2d 1032, 1049 (2d Cir. 1985) (inaction); Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994) (inaction); United States v. Monsanto Co., 858 F.2d 160, 169 (4th Cir. 1988) (willful or negligent blindness); Franklin Cty. Convention Facilities Auth. v. Am. Premier Underwriters, 240 F.3d 534, 548 (6th Cir. 2001) (inaction despite regulatory agency warning of potential contaminant migration); Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 494, 495 (D.S.C. 2011), *aff'd sub nom. on other grounds*, PCS Nitrogen, Inc. v. Ashley II of Charleston,

taking steps to address recognized environmental conditions identified during the all appropriate inquiries process will likely prove to be a meaningful factor in assessing "appropriate care." With careful planning and observing these guideposts, redevelopment activities can occur in a manner that meets the "appropriate care" standard.[484]

As courts begin to focus on whether the brownfield purchaser's management of the property occurred in a reasonable and timely manner to minimize and address any environmental concerns while developing or restoring the property to a productive use, as the *3000 E. Imperial* court evidently did, courts should come to recognize that an expansive construction of "disposal" will thwart the congressional aim in the Brownfields Amendments. While a broad construction may be appropriate in CERCLA § 107(a)(2) cases, applying such a broad construction to the Brownfields Amendments' liability defenses will reinforce the longstanding reluctance of would-be brownfield developers from stepping forward to restore these properties to economic productivity. The risk of draconian liability for contamination that the brownfield purchasers did not cause will perpetuate the disincentive to any redevelopment activity that Congress thought it had remedied in 2002. Courts will need to be persuaded that even if their circuit has adopted the expansive interpretation of "disposal" in the CERCLA § 107(a)(2) context, they are free—indeed, obligated—to adopt a different construction of the term for the Brownfields Amendments that is faithful to the congressional aim of the amendments.[485]

V. PROHIBITED AFFILIATIONS AND CONTRACTUAL RELATIONSHIPS

All three categories of innocent purchasers eligible for CERCLA landowner liability defenses are subject to a non-affiliation condition. Unless certain exceptions apply, the non-affiliation condition disqualifies purchasers from CERCLA liability protection if they have prohibited affiliations with potentially responsible parties or if they are engaged with any potentially responsible parties in certain contractual,

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LLC, 714 F.3d 161 (4th Cir.), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013) (failure to follow regulatory authority's instructions and inaction following technical consultant's advice regarding additional soil sampling).

484 To facilitate satisfying the "appropriate care" obligation, the ASTM Continuing Obligations Guide provides guidance on preparing a "continuing obligations plan." ASTM CONTINUING OBLIGATIONS GUIDE, E2790-11, *supra* note 78, § 9.4.

485 *See supra* section III.E.1.

corporate, or financial relationships.[486] The concept of these disqualifying relationships has had a complicated history dating back to the original CERCLA enactment in 1980.

Under the original iteration of the statute, Congress included a contractual relationship prohibition within the third party defense, but it did not define the term.[487] Congress was concerned that if potentially responsible parties were permitted to escape liability by validly presenting themselves as innocent third parties, "they would have little incentive to prevent pollution by their suppliers, franchisees, employees or other third parties with whom they have ongoing relationships which can directly affect the safety of their daily management of toxic substances;"[488] however, the prohibition had unintended consequences. It denied the third party defense to innocent purchasers of a property by deeming contracts with sellers to buy the property as a contractual relationship.[489] Congress responded in 1986 by amending the statute to describe the types of prohibited contractual relationships as including "land contracts, deeds, easements, leases, or other instruments transferring title or possession," but then granted an exemption for instruments that transfer title or possession of a property for persons that otherwise qualify as innocent landowners. This clarification became part of the ILO defense.[490]

When Congress enacted the Brownfields Amendments in 2002, Congress included a non-affiliation clause in the BFPP and CPO defenses, but used slightly different language than the 1986 revision of the third party defense. Both the BFPP and ILO defenses exempted relationships "created by the instruments by which title to the facility is conveyed or financed" from the ban on contractual, corporate, or financial relationships.[491] Unlike the ILO clause, the BFPP and the CPO provisions include an exemption for "a contract for the sale of goods or services," but the CPO provision lacks the exemption for property conveyance instruments found in the other two defenses.[492] The CPO and BFPP provisions also contain a clause disqualifying the defendant

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[486] CERCLA §§ 101(40)(H), 107(b)(3), 107(q)(1)(A)(ii), 42 U.S.C. §§ 9601(40)(H), 9607(b)(3), 9607(q)(1)(A)(ii).

[487] *See supra* text accompanying note 14.

[488] H.R. REP. NO. 99-253, pt. 1, at 288 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2963.

[489] *See supra* text accompanying note 12.

[490] CERCLA § 101(35)(A), 42 U.S.C § 9601(35)(A). *See supra* text accompanying note 13.

[491] CERCLA §§ 101(35)(A), 101(40)(H)(i)(II), 42 U.S.C. §§ 9601(35)(A), 9601(40)(H)(i)(II).

[492] *Id.* § 107(q)(1)(A)(ii)(I), 42 U.S.C. § 9607(q)(1)(A)(ii)(I).

from CERCLA liability protection if it is "the result of a reorganization of a business entity that was potentially liable."[493]

EPA recognized the potential for confusion stemming from the new non-affiliation provisions as early as 2003. In its Common Elements Guidance, EPA noted that the text and legislative history provided no definition of the phrase "affiliated with" and it saw the danger of extreme applications that it doubted were the concern Congress sought to address with the prohibition.[494] EPA believed that the clause was intended to prevent the pawning off of liability onto corporate or family straws.[495] The third party defense does not contain the "affiliated with" language that applies to the BFPP and CPO defenses, but the third party defense prohibits an employment, agency, or contractual relationship (except for the property conveyance relationship described above) between the defendant and the third party whose act or omission caused the release or threat of release of hazardous substances.[496]

EPA's fear that the non-affiliation provisions would lead to extreme applications has proved to be prophetic. [497] In the only reported case addressing the non-affiliation provision of the BFPP section, the *Ashley II* district court disqualified the purchaser of an industrial property from BFPP status because, among several reasons, that party had included as part of the property purchase and sale agreement a release and indemnity provision agreeing to reimburse the sellers in the event that the sellers were held liable for contamination on the property.[498] The

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493 CERCLA §§ 101(40)(H)(ii), 107(q)(1)(A)(ii)(II), 42 U.S.C. §§ 9601(40)(H)(ii), 9607(q)(1)(A)(ii)(II).

494 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 5.

495 *Id.* ("Congress intended the affiliation language to prevent a potentially responsible party from contracting away its CERCLA liability through a transaction to a family member or related corporate entity."). *See also* H.R. REP. No., pt. 1, 99-253, at 288 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2963 (describing the major goal of the affiliation prohibition as "prevent[ing] polluters from contriving to contract away their liability to third parties with whom they have ongoing business relationships").

496 EPA, COMMON ELEMENTS GUIDANCE, *supra* note 61, at 5–6. *See* CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3).

497 Some lower courts also saw the potential for confusion stemming from the phrase "in connection with a contractual relationship, existing directly or indirectly, with the defendant" (CERCLA § 107(b)(3), 42 U.S.C. § 9607(b)(3)) well before the 2002 amendments. For example, in 1992, the Second Circuit held that "something more than a mere contractual relationship is required" to preclude a defendant from asserting the third party defense and that a prohibited contractual relationship arises only when "the contract between the landowner and the third party somehow is connected with the handling of hazardous substances" or "if the contract allows the landowner to exert some control over the third party's actions. . . ." Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 964 F.2d 85, 89 (2d Cir. 1992).

498 Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., 791 F. Supp. 2d 431, 460 (D.S.C. 2011), *aff'd sub nom. on other grounds*, PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714

court quoted, but then apparently ignored the provision in the BFPP section that excludes the "instruments by which title to the facility is conveyed or financed" from the prohibition of "any contractual, corporate, or financial relationship."[499]

The court's conclusion that the release and indemnity provision in the purchase agreement was a forbidden contractual relationship apparently stemmed from the buyer's actions to minimize his exposure to possible obligations under the indemnity clause. When the buyer became aware that EPA was investigating the property for possible CERCLA enforcement action, it approached the agency and urged EPA not to commence an enforcement action against the sellers. The court evidently perceived something unseemly in the buyer approaching the agency and concluded:

> [Buyer's] efforts to discourage EPA from recovering response costs from the [sellers] reveals just the sort of affiliation Congress intended to discourage. The court finds that [buyer's] contractual release of the [sellers] makes [buyer] potentially liable for response costs at the Site and is a prohibited affiliation, which precludes the application of the BFPP defense.[500]

The court's analysis has several serious defects that cast doubt on whether it correctly applied the non-affiliation requirement. First, although the court correctly quoted the applicable provision of the BFPP section, including the exemption for instruments that transfer title to the property, [501] it provided no explanation why the court believed that the exemption was inapplicable to indemnity clauses in the property purchase agreement. Second, the court acknowledged EPA's guidance that "courts should be guided by Congress's intent of preventing transactions structured to avoid liability,"[502] but it then failed to discuss whether the release and indemnity agreement amounted to avoidance of liability of the sort Congress sought to prevent. Given the express provision excluding the property sale agreement from the prohibition against contractual relationships, the release and indemnity clauses were

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F.3d 161 (4th Cir.), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013) (The court's finding reads in pertinent part: "[Sellers] contracted with [buyer] to sell the remaining property at the site. The Contract of Sale contemplated that the parties would enter into an environmental indemnity agreement that would be made part of the Contract of Sale.") (citations to record omitted).

499 *See id.* at 502 (quoting CERCLA § 101(40)(H), 42 U.S.C. § 9601(40)(H)).

500 *Id*. (citations to record omitted).

501 *Id*.

502 *Id*. (internal quotation marks omitted).

in effect an allocation of risk of future liability between buyer and seller as part of the purchase price for the property.

Third, the court appears to have overlooked a separate provision in CERCLA that expressly affirms the validity of indemnity and hold harmless agreements involving CERCLA liability while also prohibiting any agreement to transfer CERCLA liability from a responsible party to someone else.[503] Throughout EPA's investigation of the property, the sellers remained potentially liable to the government. Such indemnity agreements do not affect the responsible party's liability but do address who ultimately pays for that liability.[504] There is nothing in the legislative history to suggest that Congress sought to alter the legal consequences of such agreements when they are incorporated in the property purchase agreement.[505]

Fourth, the court seemed to have been offended by the buyer's effort to persuade EPA not to pursue an enforcement action against the sellers. This led the court to conclude that the buyer's advocacy urging EPA not to pursue an enforcement action is "just the sort of affiliation Congress intended to discourage."[506] This conclusion appears without any citation or further explanation in the court's opinion.[507] Nothing in the legislative history indicates that private party regulatory advocacy before EPA on its enforcement actions was ever a consideration in adoption of the affiliation prohibitions.[508]

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503 CERCLA § 107(e)(1), 42 U.S.C. § 9607(e)(1); *see*, *e.g.*, Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458 (9th Cir. 1986); Harley Davidson, Inc. v. Ministar, Inc., 41 F.3d 341, 342–44 (7th Cir. 1994); Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 210–11 (3d Cir. 1994).

504 *See Mardan Corp.*, 804 F.2d at 1459 ("Contractual arrangements apportioning CERCLA liabilities between private 'responsible parties' are essentially tangential to the enforcement of CERCLA's liability provisions.").

505 *See* H.R. CONF. REP. No. 99-962, at 186–88, *reprinted in* 1986 U.S.C.C.A.N. 3279–81.

506 *Ashley II*, 791 F. Supp. 2d at 502.

507 *Id*.

508 Private party advocacy before the Legislative and Executive Branches has long been grounded on constitutional provisions protecting the right to petition the government for redress of grievance. *See* U.S. CONST. amend. I ("Congress shall make no law respecting … the right of the people … to petition the Government for a redress of grievances."); Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961) ("The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade those freedoms."); Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972) (describing *Noerr* as precluding a cause of action "insofar as it was predicated upon mere attempts to influence the Legislative Branch for the passage of laws or the Executive Branch for their enforcement."); Venetian Casino Resort, L.L.C. v. NLRB, Nos. 12–1021, 12–1076, 2015 WL 4153872 , at *8 (D.C. Cir. July 10, 2015) (holding that communication with police urging enforcement action in labor dispute context is protected petition). Although "lobbying" the Executive or Legislative Branches on behalf of self-interest is sometimes perceived as a sinister activity, the Supreme Court has never cast doubt on its legitimacy, even when the purpose of the lobbying was to advance a financial interest or to achieve a result that were it pursued outside the

The *Ashley II* decision has created a quagmire in interpreting the non-affiliation clause of the Brownfields Amendments. Release and indemnification clauses are routine components of commercial real estate transactions, and the court's questioning of their legitimacy becomes a new impediment to transactions aimed at redeveloping brownfields sites. The Fourth Circuit's review of this case did nothing to resolve the confusion. The Court of Appeals agreed that the buyer had failed to satisfy the BFPP defense on other grounds and did not address the district court's non-affiliation ruling.[509]

Following the *Ashley II* decision, EPA issued another guidance document targeted directly at the non-affiliation issue and expressing its enforcement policies on that issue.[510] The agency affirmed its understanding of non-affiliation as essentially aimed at preventing a potentially liable party from transferring its liability to a related entity, and it stated that it would consider "deeds or agreements that make transfer of title possible" as within the statutory carve-out, implying that it disagreed with the *Ashley II* court's analysis of the issue.[511] It also outlined relationships that it would not treat as affiliations, including relationships at other properties, relationships that arise after the purchase and sale of properties, and tenants seeking to purchase leased property.

The scope of EPA's guidance on the non-affiliation clauses is necessarily limited to a statement of agency enforcement intentions. Since the result in *Ashley II* seems to confound the statute and discourage brownfields rehabilitation by prohibiting routine property sale indemnity provisions, the issue is likely to be raised again in future CERCLA litigation.

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context of petitioning for government relief would itself be unlawful. *See*, *e.g.*, *Noerr*, 365 U.S. at 139 ("It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors."); United Mine Workers v. Pennington, 381 U.S. 657, 669 (1965) (anti-competitive purpose in seeking to influence passage or enforcement of laws does not violate the antitrust laws).

509 *See* PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161, 184 (4th Cir.), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013).

510 EPA, ENFORCEMENT DISCRETION GUIDANCE REGARDING THE AFFILIATION LANGUAGE OF CERCLA'S BONA FIDE PROSPECTIVE PURCHASER AND CONTIGUOUS PROPERTY OWNER LIABILITY PROTECTIONS (2011), *available at* http://www2.epa.gov/sites/production/files/2013-11/documents/affiliation-bfpp-cpo.pdf.

511 *Id*. at 10 ("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.") (footnotes omitted).

VI. CONCLUSIONS

There is reason for hope that over time the Brownfields Amendments can achieve the goals of its legislative sponsors—to further brownfield redevelopment by providing liability relief for innocent parties interested in cleaning up the contaminated properties, removing fears that they will become liable for someone else's mess. For many years prior to 2002, courts approached CERCLA litigation with a jurisprudential philosophy that the liability provisions must be liberally construed to achieve the remedial purposes of the statute and that defenses must be narrowly construed.[512] Whether this was a valid approach in the CERCLA enforcement context is beyond the scope of this article, but there is no doubt that one of the unintended consequences of those interpretations has been to discourage brownfields redevelopment—the condition that the Brownfields Amendments was aimed at remedying.[513]

In enacting the Brownfields Amendments, Congress wanted to break this link between new property owners who had no involvement with the contamination on the property and the CERCLA liability provisions. But Congress was also unwilling to give developers of these properties a free pass. Congress expected the new owners to act responsibly in addressing the existing contamination by imposing a series of continuing obligations as the price for receiving CERCLA liability protection. These continuing obligations were not to be equated with the stringent requirements imposed on potentially responsible parties under the CERCLA liability scheme, but were common sense requirements aimed at exercising "appropriate care" to address urgent environmental risks before and during the redevelopment process to minimize the risks from those conditions at reasonable cost.

If the Brownfields Amendments are to achieve their intended purpose, courts need to interpret the continuing obligations through the

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[512] *See*, *e.g.*, Prisco v. A&D Carting Corp., 168 F.3d 593, 602 (2d Cir. 1999) ("As a remedial statute, CERCLA should be construed liberally to give effect to its purposes." (quoting B.F. Goodrich v. Betkoski, 99 F.3d 505, 514 (2d Cir. 1996)) (internal quotation marks omitted); Westfarm Assocs. Ltd. P'ship v. Washington Suburban Sanitary Comm'n, 66 F.3d 669, 677 (4th Cir. 1995) (noting CERCLA's "narrow defenses for damages caused solely by act of God, war, or third parties"); Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863, 880–81 (9th Cir. 2001) (en banc) (construing CERCLA liberally to effectuate the statute's two primary goals: (1) to ensure the prompt and effective cleanup of waste disposal sites, and (2) to assure that parties responsible for hazardous substances bear the cost of remedying the conditions they created); *id.* at 883 ("Congress intended the [ILO] defense to be very narrowly applicable, for fear it might be subject to abuse."); United States v. Hercules, Inc., 247 F.3d 706, 715 (8th Cir. 2001) (CERCLA liability attaches subject only to three narrowly defined defenses).

[513] *See supra* text accompanying notes 21–23.

lens of Congress's intent to promote redevelopment. Unfortunately, the judicial thumb continues to weigh on the liability side of the Superfund scale while giving little weight to Congress's 2002 goal of balancing flexible environmental management with incentives to restore these properties to economic viability. The few courts that have construed the Brownfields Amendments seem reluctant to view those cases through a different lens than the familiar CERCLA enforcement paradigm.[514]

Supreme Court review of CERCLA litigation, while infrequent, has repeatedly rejected the expansive liability readings embraced by lower federal courts, EPA, and the Department of Justice.[515] In fact, the Court in 2014 specifically took the Fourth Circuit to task for resolving a CERCLA ambiguity on the basis that remedial statutes should be liberally construed rather than on the text and structure of the statute. In *CTS Corp. v. Waldburger*, the Court explained that "almost every statute might be described as remedial in the sense that all statutes are designed to remedy some problem."[516] By instructing courts to focus on the text and structure of the statute, the Court was emphasizing that statutes typically have multiple purposes and that legislation, often the

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514 *See* PCS Nitrogen Inc. v. Ashley II of Charleston LLC, 714 F.3d 161 (4th Cir.), *aff'g* 791 F. Supp. 2d 431 (D.S.C. 2011), *cert. denied*, 571 U.S. ___, 134 S. Ct. 514 (2013); Voggenthaler v. Md. Square LLC, 724 F.3d 1050, 1057–58 (9th Cir. 2013); Saline River Props., LLC v. Johnson Controls, Inc., 823 F. Supp. 2d 670, 684-86 (E.D. Mich. 2011). Even if these courts had followed the approach suggested in this article, each of the cases almost surely would have reached the same result based on insufficient evidence to qualify for the asserted defense. In *Ashley II*, the district court declined to admit expert testimony supporting the claim that there had been no disposal of hazardous substances after Ashley II acquired the property due to violation of a procedural rule requiring notice that an expert witness was to be called. *See supra* text accompanying note 335. In *Saline River*, summary judgment on the issue whether there had been no post-acquisition disposal was denied because the party opposing summary judgment presented material contrary evidence. In addition, the court found that Saline River Properties had not submitted evidence to support the other elements of the BFPP defense. *See supra* text accompanying notes 348–51. And in *Voggenthaler*, the Court of Appeals did not address whether post-acquisition disposal had occurred, but it concluded that the proffered evidence to demonstrate "appropriate care" (and excluded by the district court on procedural grounds) was insufficient, but it nevertheless remanded to give the defendant another opportunity to present sufficient evidence and to cure the procedural error. *See supra* text accompanying note 85. *But see* 3000 E. Imperial, LLC v. Robertshaw Controls Co., No. CV 08-3985 PA, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. Dec. 29, 2010) (upholding BFPP defense).

515 *See*, *e.g.*, Burlington N. & Santa Fe Ry. v. United States, 556 U.S. 599 (2009) (rejecting government's and lower court's construction of arranging for disposal of hazardous substances and apportioning liability); United States v. Atlantic Research Corp., 551 U.S. 128, 134-36 (2007) (rejecting government's position that a potentially responsible party is ineligible for initiating a cost recovery action against other potentially responsible parties); United States v. Bestfoods, 524 U.S. 51, 61–63 (1998) (rejecting CERCLA liability by corporate parent for acts of its subsidiary without the parent's involvement in the action). *See generally* John Barkett, *CERCLA and the Supreme Court*, 29 NAT. RES. & ENV'T 58 (Winter 2015) (surveying cases).

516 CTS Corp. v. Waldburger, 573 U.S. ___, 134 S. Ct. 2175, 2185 (2014).

product of compromise, does not pursue its primary purpose at all costs.[517] In the case of CERCLA, on the one hand, the original primary purpose of the statute supported a broad liability sweep. On the other hand, the 2002 amendments did a narrowly focused about-face to give liability relief to certain "innocent" parties as an incentive to restore contaminated property to achieve renewed economic productivity. The challenge for the courts is to reconcile these opposing goals embodied within a single statute so that the social policy aimed at revitalizing communities with brownfield properties is not again thwarted by the broad CERCLA liability scheme that created the conditions that Congress sought to remedy.

It is well known that CERCLA's text has not been a model of legislative clarity, [518] and it would be fair to say that the Brownfields Amendments are not much clearer.[519] But there is no doubt what Congress was trying to accomplish. Our analysis of the Brownfields Amendments in light of well-established tools of statutory construction demonstrates that the goals of the amendments can be achieved under the existing statutory framework. If courts approach the liability defenses with the clear congressional goals in mind, developers should be confident that the courts using hindsight will not second-guess the "reasonable steps" they have taken and will judge the reasonableness of those actions based on what the property owner knew at the time and the balance of competing interests contained within the Brownfields Amendments.[520] Courts must also be prepared to reconsider previously defined terms, such as "disposal," in light of the purpose and context of the Brownfields Amendments, even if appellate courts construed the term under the CERCLA provisions that predate the 2002 amendments.[521] And finally, courts must avoid interpreting ambiguous statutory provisions to result in innocent property owners forfeiting their eligibility for the CERCLA liability defenses because of failure to comply with obligations about which they had no notice and were not

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[517] *Id*. ("[N]o legislation pursues its purposes at all costs." (quoting Rodriguez v. United States, 480 U. S. 522, 525–26 (1987) (per curiam)) (internal quotation marks omitted).

[518] *See* Carson Harbor Village, Ltd. v. Unocal Corp. 270 F.3d 863, 883 (9th Cir. 2001) (en banc) (" Clearly, neither a logician nor a grammarian will find comfort in the world of CERCLA."); *id*. at 888-89 (Fletcher, J., concurring in part and dissenting in part) ("I agree with the majority that CERCLA is not a model of legislative clarity. Inconsistencies and redundancies pervade the statute.") (footnote omitted).

[519] *See supra* text accompanying notes 76, 87–91.

[520] This is illustrated by the District Court's analysis in 3000 E. Imperial, LLC v. Robertshaw Controls Co., No. CV 08-3985 PA, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. Dec. 29, 2010). *See* text *supra* at notes 481–82.

[521] *See supra* section IV.A–C.

readily discoverable during the pre-acquisition due diligence.[522] Nothing in the legislative materials suggests that innocent brownfield purchasers should be penalized for unknown lapses that regulators or prior property owners caused.

Successful implementation of the Brownfields Amendments is not solely dependent on judicial action. Developers must be aware of their obligations under the amendments as soon as they contemplate purchasing a property. Eligibility for the CERCLA defenses involves requirements prior to acquisition of the property as well as obligations that are triggered as soon as the purchaser acquires the property.[523] It is too late if the property owner begins thinking about continuing obligations when CERCLA litigation is filed or threatened. The ASTM Continuing Obligations Guide is one tool for developer planning for satisfying the continuing obligations. [524] The Brownfields Amendments, which Congress passed unanimously, will work if implemented and interpreted consistently with its stated goals.

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[522] *See supra* section III.E.2.

[523] *See supra* section II.C–D.

[524] *See* ASTM CONTINUING OBLIGATIONS GUIDE E2790-11, *supra* note 78.