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Learn From the Mistakes of Others: A Review of CERCLA’s Bona Fide Prospective Purchaser Defense to Inform Winning Strategies

J. Michael Sowinski, J.D., Vice President, Terradex, Inc.



I. CERCLA Can Pose Problems for Brownfield Purchasers.

The summer 2025 EBA Journal described CERCLA and its defenses.¹ And for good reason. In the brownfield purchase or lending situation, CERCLA liability can be a main risk. CERCLA holds brownfield property owners liable for cleanup costs, unless they can successfully assert a defense. If not anticipated, these costs can meaningfully undermine redevelopment, impose huge burdens on the borrower, put the borrower's ability to repay at risk, and reduce if not nullify the value of the property.

For the brownfield purchaser, CERCLA liability could potentially arise in three main situations. First, though less likely, EPA could perform cleanup and require the brownfield purchaser to pay. Second, if the prior owner performs additional cleanup (*e.g.*, because of state enforcement), the prior owner can bring a private CERCLA action to recover costs from the brownfield purchaser — this was the situation in the *Von Duprin* case, discussed below. Third, if the brownfield purchaser incurs cleanup costs, CERCLA liability can undermine their ability to recover costs from the prior owner — this was the situation in *Ashley II* and *Old Gate Partners*, discussed below.

Brownfield purchasers can protect themselves from CERCLA risks, if they can satisfy the Bona Fide Prospective Purchaser (BFPP) defense.

II. CERCLA's BFPP Defense Requires All Appropriate Inquiries and Many Additional Elements.

CERCLA's BFPP defense allows brownfield purchasers to knowingly buy contaminated property and, with some conditions, remain free from CERCLA liability. As one court explained, “[t]he BFPP defense shields from CERCLA liability those who invest in contaminated lands and exercise diligence, do not impede cleanup efforts, and meet ongoing obligations.”²

BFPP defense seekers need to prove that they performed all appropriate inquiries and also met several additional elements of the defense — most of which remain ongoing indefinitely and, as such, have been dubbed “continuing obligations” by EPA.³ The Summer 2025 EBA Journal (and elsewhere) list the specific elements of the BFPP defense.⁴ I summarize them here.

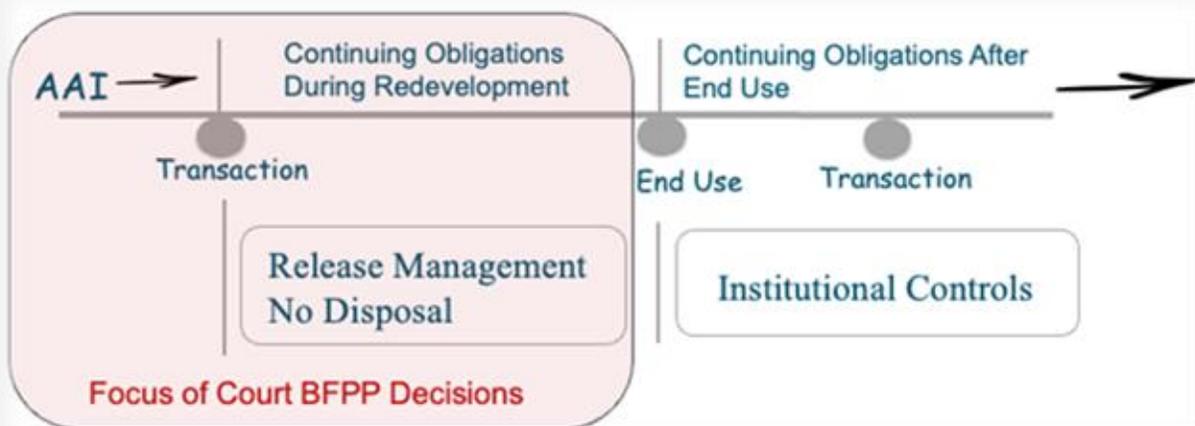
Pre-Purchase Threshold Requirements

All Appropriate Inquiry	Prior to purchase, perform all appropriate inquiries (which could be satisfied by adherence to the ASTM Phase I Standard) into the prior ownership and uses of the property.
No Affiliation	Demonstrate no “affiliation” with a liable party.
Core Continuing Obligation	
No Disposal	Demonstrate that no disposal of hazardous substances occurred at the facility after acquisition.
Release Management	Exercise appropriate care by taking reasonable steps to stop continuing release, prevent threatened future release; and prevent or limit exposure to any previously released hazardous substance.
Institutional Controls	Comply with relied-on land use restrictions and do not impede the effectiveness or integrity of any institutional control.
Cooperation and Notice Continuing Obligations	
Cooperation	Provide full cooperation, assistance, and access to persons authorized to conduct response actions.
Information Requests	Comply with information requests and subpoenas issued under CERCLA.
Legally Required Notice	Provide legally required notices for the discovery or release of any hazardous substances.

Many have criticized the BFPP defense as being too difficult to meet.⁵ Court decisions, which have overwhelmingly disfavored the brownfield purchaser, lend support to this criticism.

III. Judicial Opinions on the BFPP Defense Have Focused on the Purchase or Redevelopment Timeframe, Prove Exacting, and Overwhelmingly Find Against the Brownfield Purchaser.

Though still fairly few — and thus far focused only on AAI and the redevelopment stage — the judicial opinions on the BFPP defense go against defense seekers, with only one exception.



Defective All Appropriate Inquiries	
<p><i>Von Duprin LLC v. Major Holdings LLC (2021)</i>⁶</p> <p>Defective AAI (EP Certification)</p>	<p>Years after the brownfield purchase, Indiana Department of Environmental Management brought an enforcement action against the prior owner, Von Duprin, due to the discovery of chlorinated solvents and vapor intrusion. Von Duprin sought cost recovery against the brownfield purchaser, Major Holdings, who claimed to be a BFPP. Because Major’s Phase I report failed to provide the Environmental Professional attestations required in 40 CFR 312.21, the court denied Major’s BFPP status.</p>
<p><i>BankUnited, N.A. v. Merritt Env’tl. Consulting Group (2018)</i>⁷</p> <p>Defective AAI (Interviews)</p>	<p>A year after refinancing a loan, New York and EPA brought an enforcement action against the borrower because of radiological contamination. The bank’s consultant-prepared Phase I failed to interview state and local officials leading to a defective and misleading Phase I, which did not identify any issues. The bank lost out on significant repayment and the value of the property was later appraised at “nothing.” Notwithstanding the Phase I’s error, the bank’s claims against the consultant were time barred.</p>

Defective Continuing Obligations During Redevelopment	
<p><i>Ashley II of Charleston, Inc. v. PCS Nitrogen, Inc. (2011)</i>⁸</p> <p>(Defective Appropriate Care; Disposal)</p>	<p>The court found that the new owner failed to qualify as a BFPP because during large-scale cleanup and redevelopment (which were being performed under agency oversight): (1) it exposed contaminated sumps (which had been identified during AAI) to the elements after building demolition, which exacerbated the conditions at the property; (2) failed to maintain a limestone rock cover over contaminated soil; (3) failed to address a debris pile at the site. Additionally, the court concluded that “disposals” likely occurred because sumps with contaminated water overflowed when it rained and the overflow traveled to the edges of concrete pads and to cracks in the concrete.</p>
<p><i>In Voggenthaler v. Md. Square LLC, (2010)</i>⁹</p> <p>(Defective Appropriate Care)</p>	<p>The court found that the brownfield purchaser failed to satisfy the BFPP defense because, during redevelopment, they exposed contaminated soil to the elements when they demolished a building and took no steps to remove the contaminated soil or limit the spread until many years later. The court characterized this as failing “to prevent further harm.”</p>
<p><i>Cranbury Brick Yard, LLC v. United States (2018)</i>¹⁰</p> <p>(Disposal)</p>	<p>The court found that the new owner failed to qualify for the BFPP defense because it committed “disposal” by spreading contaminants. During redevelopment, the new owner ruptured an underground storage tank, spilled twenty gallons of petroleum and, in turn, excavated the contaminated soil, stockpiled it on site, and then mixed it with noncontaminated soil for use as fill on the site.</p>
<p><i>Saline River Props. (2011)</i>¹¹</p> <p>(Defective Appropriate Care; Disposal)</p>	<p>The court found that the new owner failed to qualify for the BFPP defense because it took no reasonable steps after removing a concrete slab that covered contamination, allowing rainwater into the contaminated ground and exacerbating the conditions. Also, the court reasoned that the new owner’s actions of removing the slab and, in turn, causing contaminants to migrate could constitute “disposal” by the new owner.</p>
<p><i>Old Gate Partners, LLC v. Paddock Enters., LLC (2025)</i>¹²</p> <p>(Disposal)</p>	<p>The court found that the brownfield purchaser, after a proper Phase I, subsequent purchase, proper Phase II, and performing cleanup with state agency involvement, nonetheless did not satisfy the BFPP defense because “disposal” occurred during its ownership—impacting its ability to recover cleanup costs from prior owners. The court focused on two 25,000-gallon underground tanks — identified by the Phase II as being abandoned in place years prior and reportedly empty but with “measurable TCA” in associated piping — but which were never removed after purchase. The court concluded, “[i]t appears more likely than not that at least some amount of TCA leaked into the soil during [the brownfield purchaser’s] ownership,” constituting a disposal.</p>

Successful Continuing Obligations During Redevelopment

*3000 E. Imperial, LLC v. Robertshaw Controls Co.*¹³

(Appropriate Care)

The court found that even though it took about a year and a half after brownfield purchase, the purchaser met the BFPP defense’s “appropriate care” requirement by sampling the contents of underground tanks, working with the state environmental agency, and ultimately emptying and removing the tanks. Relatedly, the court approvingly cited the fact that the purchaser had enrolled in and was successfully following the state’s voluntary cleanup program requirements.

IV. EPA Guidance (and Comfort Letters) Provide Instruction on BFPP Requirements.

EPA’s Common Elements Guidance primarily focuses on the elements named in the Core Continuing Obligations, above.

Disposal. Recognizing the no disposal element as being complex and important, EPA’s Guidance divides disposal into four categories - each of which it recommends treating differently as follows:

- (1) brand new or initial disposals (not BFPP);
- (2) secondary disposals, such as movement/dispersal of contaminated soil, when working to contain or remediate (BFPP);
- (3) secondary disposals, such as movement/dispersal of contaminated soil during redevelopment — e.g., grading (BFPP, if undertaken in a reasonable manner); and
- (4) leaking or migrating contaminants, e.g., from an underground tank (BFPP, if took reasonable steps to address).

Institutional Controls. Even though this element has not yet been addressed in judicial opinions, the well-recognized potential for breaches makes many view this requirement as a crucial piece of the BFPP defense. The EPA Guidance provides detailed discussions on “land use restrictions” and “institutional controls,” each of which have subtly different BFPP requirements.

- (1) “land use restrictions” involve legally binding use or activity restrictions or limitations (not BFPP, if do not comply with);
- (2) “institutional controls” are a broader category of future use restrictions involving administrative and legal controls of which “land use restrictions” is a subset (not BFPP, if impede or fail to maintain integrity of).
- (3) EPA’s Guidance also recommends “institutional control” and “land use restriction” monitoring. “While monitoring the property and associated ICs or land use restrictions is not a distinct requirement under the statute [to establish the BFPP defense], doing so is one way to ensure that a party continuously complies with the land use restrictions and does not impede the effectiveness or integrity of the ICs.”

Appropriate Care. EPA’s Guidance provides examples while also explaining that EPA may provide “comfort letters” to address appropriate care requirements in site specific circumstances. The following lists just some of the examples provided.



Categories of Appropriate Care	Representative Examples (see EPA Guidance for more examples)
Prevent the Exacerbation of Contaminated Site Conditions	<ul style="list-style-type: none"> • Digging or disturbing soil without consulting EPA. • Exposing groundwater or altering groundwater flow. • Construction of structures that may exacerbate contamination or create exposure pathways. • Protect from erosion and stormwater discharge.
Future Use Restrictions	<ul style="list-style-type: none"> • Install and maintain fencing or physical access controls. • Record institutional controls in the official county records. • Do not install public or private wells. • Protect worker exposure to contaminated soils. • Protect future buildings from vapor intrusion. • Comply with land use restrictions.
Maintain Response Action and Engineering Controls	<ul style="list-style-type: none"> • Protect the groundwater treatment system. • Maintain the existing containment area and engineered cap. • Refrain from development or use that would impact response actions.

V. Key Points from Cases and EPA Guidance Can Help Inform Future BFPP Strategies.

Exacting Review by Courts. The courts have shown they will go through each element of the defense and take a detailed look at any conflicting activities. This is highlighted, for example, in the *Von Duprin* missing EP certification, and the *Old Gate Partners* finding of solvents in tank piping.

Timeliness Matters. Moving forward promptly to address potential releases works in the favor of brownfield purchasers, as demonstrated in *3000 E. Imperial, LLC*.

Recognized Environmental Conditions Trigger Continuing Obligations. If Phase I's identify RECs, as the *Ashley II* Court explained, taking appropriate care to address the identified issues can be crucial for the BFPP defense.

Exacerbation During Redevelopment. A common theme emerges from the defective appropriate care cases — exacerbation of releases caused brownfield purchasers to lose the BFPP defense.



Conventional Brownfield Process Under Agency Oversight. Even when proceeding under agency oversight, brownfield purchasers have still lost their BFPP defense, as highlighted in *Ashley II*, and *Old Gate Partners*. In such cases, BFPP requirements have seemingly proved more encompassing than the conventional brownfield process.

Disposal Has Proved Problematic. The prohibition on no disposal has proved especially problematic,¹⁴ as highlighted in *Cranbury Brick*, *Old Gate Partners*, *Saline River Props.*, and *Ashley II*.

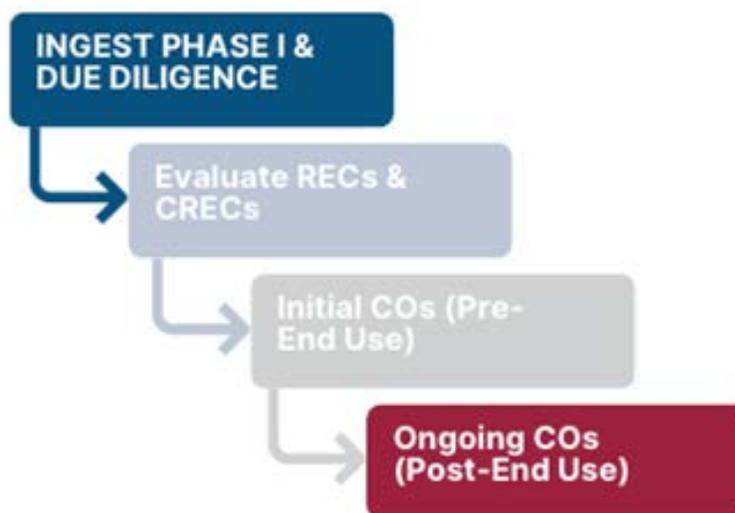
Institutional Controls. A lack of case law leaves uncertainty as to exactly what is required. However, EPA's Common Elements Guidance stresses the importance of IC monitoring and additional EPA Guidance on advanced approaches for IC monitoring¹⁵ lists many IC monitoring approaches, which could prove instructive to future courts. If courts prove as exacting as they have in other BFPP cases, it seems likely that institutional control compliance questions will be similarly analyzed.

VI. Even Though the BFPP Defense Has Proved Exacting and Nuanced, Brownfield Purchasers Can Successfully Establish a BFPP Defense with Careful Attention and Planning: ASTM's Guide Provides a Four-Step Framework.

Cases and EPA Guidance provide meaningful insights and lessons learned. Leveraging this, ASTM's Standard Guide for Identifying and Complying with Continuing Obligations (E2790) sets a standardized four-step process for navigating through the BFPP defense.

STEP BY STEP

ASTM's Guide Four Step Framework



Steps 1 and 2 cover processes to ingest the due diligence and evaluate the recognized environmental conditions. Then, with that understanding, steps 3 and 4 recommend a process for addressing what the Standard Guide describes as initial and ongoing COs.

Initial Continuing Obligations are those required during the redevelopment timeframe, before end use. This category covers “reasonable steps” and “disposal” (the topics that have received the most attention in the courts). Step 3 instructs and guides as to which reasonable steps meet site specific needs

Ongoing Continuing Obligations are those that apply after the end use and primarily address compliance with the institutional controls, which can last a very long time. The Standard Guide helps stress and recommend programs for monitoring and ensuring institutional control compliance — a practice becoming more routine as the risks involved with institutional control failure become more apparent.

Endnotes

¹ Jimmy Kirkland, John Rybak, & Dennis Firestone, *CERCLA Defenses for Landowners*, EBA Journal - Summer 2025 Vol. 10, Issue 2 at p. 98 (Jul. 22, 2025) (avail. at https://issuu.com/envirobank/docs/eba_journal_summer_2025_edition/98).

² *Von Duprin, LLC v Major Holdings, LLC*, 12 F. 4th 751, 758 (7th Cir. 2022).

³ J. Michael Sowinski, *Tracing the Evolution of the Phrase Continuing Obligations* (Feb. 21, 2011) (avail. at <https://terradex.com/wp-wp-tracing-the-evolution-of-the-phrase-continuing-obligations/>)

⁴ See, e.g., USEPA, *Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owner, or Innocent Landowners* (“Common Elements”) at 2 (July 29, 2019).

⁵ See, e.g., Andrew W. Marrero, *NOTE: Innocent in the Land of the Guilty: Promoting Efficiency and Fairness in CERCLA Defenses*, 30 Geo. Envtl. L. Rev. 521, 534 (2018) (BFPP requirements “embody perilous ... are extremely difficult to establish and costly to prove ... [and] easy to lose”).

⁶ *Von Duprin LLC v. Major Holdings, LLC*, 12 F.4th 751(7th Cir. 2021).

⁷ *BankUnited, N.A. v. Merritt Envtl. Consulting Group*, 360 F. Supp. 3d 172 (S.D.N.Y. 2018).

⁸ *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp.2d 431, 499 (D.S.C. 2011).

⁹ *Vogenthaler v. Md. Square LLC*, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. Dec. 29, 2010).

¹⁰ *Cranbury Brick Yard, LLC v. United States*, 2018 U.S. Dist. LEXIS 171458 (D.N.J. 2018).

¹¹ *Saline River Props*, 2011 U.S. Dist. LEXIS 119516 (E.D. Mich. Oct. 17, 2011).

¹² *Old Gate Partners, LLC v. Paddock Enters., LLC*, 2025 U.S. Dist. LEXIS 173241, 2025 LX 367758, 2025 WL 2555559 (D. Conn. 2025).

¹³ *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, 2010 U.S. Dist. LEXIS 138661 (C.D. Cal. Dec. 29, 2010).

¹⁴ For details on the disposal requirement, see William R. Weissman & J. Michael Sowinski, Jr., *Revitalizing the Brownfields Revitalization and Restoration Act: Harmonizing the Liability Defense Language to Achieve Brown-field Restoration*, 33 VA. ENVTL L.J. 257, 307-46 (2015).

¹⁵ EPA, *Advanced Monitoring Technologies and Approaches to Support Long Term Stewardship* (Jul. 20, 2018) (avail. at <https://www.epa.gov/enforcement/use-advanced-monitoring-technologies-and-approaches-support-long-term-stewardship>).