Off the Hook

What can brownfield buyers do to protect themselves from CERCLA liability?

By Matthew E. Cohn

Buyers of real estate are all too familiar with the Phase I Environmental Site Assessment (ESA). Born out of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), commonly known as the Superfund law, the Phase I ESA is a report prepared during a potential buyer's due diligence.

For years, potential buyers would often walk away from contaminated properties because of CERCLA's harsh liability—liability is strict (without fault) and joint and several (any one party can be liable for all). Mere ownership of contaminated property is a basis for liability under CERCLA. For many years, an owner's best chance to escape liability was the "innocent landowner" defense, which requires an owner to show a lack of knowledge of the contamination after a diligent, pre-acquisition inquiry into the environmental condition of the property. In 2002, CERCLA was amended to protect from liability knowing buyers of contaminated properties interested in pursuing redevelopment. To obtain this "bona fide" defense, there are eight requirements that an owner must meet and maintain:

1. All disposal of hazardous substances at the property must have occurred prior to acquisition.

2. The buyer must have made "all appropriate inquiries" into the previous ownership and uses of the property, including a complete and properly prepared Phase I ESA.

3. The buyer must provide all legally required notices with respect to the discovery or release of hazardous substances.

4. The buyer must exercise "appropriate care" with respect to the hazardous substances by taking reasonable steps to (a) stop any continuing release, (b) prevent any future release, and (c) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.

5. The buyer must cooperate with all governmental personnel authorized to conduct response actions or restoration activities, including providing access to the property.

6. The buyer must comply with and not impede the effectiveness of any institutional controls and land use restrictions required in connection with any response action.

7. The buyer must comply with any governmental information requests related to the contamination.

8. The buyer must not be affiliated with any person who is potentially liable for the contamination.

Since 2002, federal courts have had the opportunity to analyze "bona fide prospective purchaser" defenses asserted by landowners, and the courts have provided some useful guidance. Two lessons can be gleaned from those decisions.

The buyer must make "all appropriate inquiries" before acquiring the property. This means that the buyer's Phase I ESA report must comply with the EPA's regulations, which include, among other things, requirements that the report be prepared by a qualified environmental professional, that current and past owners, operators, occupants, and employees be interviewed, that historical property and government records be reviewed, that a site walk-through and inspection be performed, and that consideration be given to any specialized knowledge the buyer may have and whether the purchase price reflects a discount indicative of contamination.

Attorneys often counsel their clients that a detailed review of Phase I ESA reports for strict compliance is essential. This is important because the courts have shown a willingness to use the slightest of inadequacies as a basis to challenge an owner's "bona fide" and non-liable status.

The buyer must exercise "appropriate care" with respect to the contamination on the property. In this regard, the courts have looked at whether owners took "reasonable steps" to stop a continuing release, prevent a future release, and protect people and the environment from exposure. The question then is what is unreasonable.

The failure to promptly clean up and remove known areas of contamination after acquisition has been found unreasonable. The failure to maintain an engineered barrier that restricts access to contamination has been found unreasonable. Removing a building, but leaving the contaminated soil in place, has been found unreasonable. The best way to defend the appropriateness of post-acquisition care is to preemptively develop a post-acquisition environmental plan that clearly identifies any continuing obligations necessary to address any contamination, and then to implement and document compliance with that plan.

The 2002 CERCLA amendment has shown some success in advancing the redevelopment of contaminated properties by relieving responsible buyers of liability. The most important things buyers can do to obtain and guard their "bona fide" status are: to perform pre-acquisition due diligence, including a Phase I ESA, and to develop and implement an environmental plan that sets forth the appropriate care for any contamination.

Matthew E. Cohn is an officer at Greensfelder, Hemker & Gale, P.C., in Chicago.