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Nicholas J. Ortolano III

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Cover Page Footnote

Many thanks to the SJEL editorial staff for your edits and suggestions. Thank you to my family for your constant support and love; to my professors at N.C. Central and Lewis & Clark for your guidance; and to Ms. Lucy Brehm for your feedback and supervision. Finally, my endless gratitude to my wife, Jessica, the most gracious person I know.

Appropriate Care Under the Brownfield Amendments: A
Better Standard After the Fourth Circuit’s Holding in
PCS Nitrogen v. Ashley II

Nicholas J. Ortolano III[†]

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I. INTRODUCTION

In August 2000, an old, industrial brownfield lot at Kendall Square in Cambridge, Massachusetts began a transformation. Rising above the site, a LEED¹ certified platinum building now sits, housing the corporate headquarters of Genzyme. This new building is part of a larger urban revitalization project for the Kendall Square neighborhood.² The trend is not limited to Cambridge. Across the country, in Portland, Oregon, 409 blighted acres of former industrial and commercial shipping business along the south waterfront are transformed into a green, urban neighborhood.³ The revitalized neighborhood, and former brownfield, is reconnected to the city center.

Brownfields are “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence of a hazardous substance, pollutant, or contaminant.”⁴ Cleanup and reuse of brownfields “protects the environment, reduces blight, and takes development pressure off greenspaces and working lands.”⁵ Residential property values can increase between 5-12.8 percent after brownfields cleanup.⁶ Additionally, many brownfields are located within existing infrastructure, promoting urban revitalization in a cost-effective manner.⁷ Brownfield cleanup and redevelopment contributes to job growth and an increased tax base, combats crime, and reduces pollution.⁸ It is estimated that there are more than 450,000 brownfield sites in the United States.⁹

In 2002, the Small Business Liability Relief and Brownfields Revitalization Act (the “Brownfield Amendments”) was enacted. The stated purpose of the Act was to “provide relief . . . from liability under the Comprehensive Environmental Response, Compensation, and Liability Act [CERCLA] of 1980, *and to amend such act to promote the cleanup*

1. *Leadership in Energy and Environmental Design*, U.S. GREEN BLDG. COUNCIL, www.usgbc.org/leed (last visited Apr. 12, 2014).

2. *Genzyme Center: Innovative Building for an Innovative Co.*, GENZYME CENTER, www.genzyme.com/pdf/genzctr_background.pdf (last visited Oct. 1, 2014).

3. ENVIRONMENTAL PROTECTION AGENCY, EPA 560-F-12-013: BROWNFIELDS at a GLANCE (2012), available at http://www.epa.gov/brownfields/success/portland_or_caruthers_brag.pdf.

4. 42 U.S.C. § 9601(39) (2006).

5. *Brownfields and Land Revitalization*, EPA.GOV, <http://www.epa.gov/brownfields/index.html> (last updated Sept. 26, 2014).

6. *Id.*

7. For more information on the impact of brownfields, see *Infra*. III.B.

8. *Id.*

9. EPA.GOV, *supra*, note 5. Some estimates put this number between 600,000 and 1,000,000. See S. REP. NO. 107-244, at 2 (2002).

and reuse of brownfields[.]”¹⁰ The amendments added an important provision that sought to protect certain parties from CERCLA liability, and became known as the Bona Fide Prospective Purchaser (BFPP) defense. This defense would shield against liability as a potentially responsible party (PRP) under CERCLA for developers acquiring contaminated real property after January 11, 2002.¹¹ This defense requires the purported BFPP to establish eight criteria by a preponderance of the evidence.¹² One of the BFPP defense’s eight criteria requires showing an exercise of “appropriate care with ... hazardous substances ... by taking reasonable steps to” stop additional releases of hazardous substances, and preventing or limiting exposure of the hazardous substances to humans, the environment, or natural resources after acquiring the property.¹³

Prior to the amendments, the main defense against PRP liability was for a party to claim status as an innocent landowner.¹⁴ This defense required the party to show an exercise of “due care” by a preponderance of the evidence with respect to the release or threat of release of any hazardous substance.¹⁵ There was little to no explanation at the time of the Amendments as to whether “appropriate care” and “due care” impose different standards of care.

In 2013, the Fourth Circuit became the first federal appellate court to interpret the scope of “appropriate care” under CERCLA’s BFPP defense in a reported case. The Court held in *PCS Nitrogen v. Ashley II* that Ashley II, the current owner of a portion of a former fertilizer facility, failed to establish a BFPP defense for liability exemption.¹⁶ The Court affirmed the District Court’s holding that Ashley II was a PRP through its failure to establish a number of the eight criteria for the BFPP defense, including the exercise of appropriate care.¹⁷ In doing so, the Court rejected Ashley II’s argument that appropriate care was a lesser standard than due care. The Court speculated that appropriate care might even be a higher standard than due care, but ultimately held it to be at least as stringent as due care.¹⁸

The Fourth Circuit’s holding reflects a poor policy choice in light of the stated goals of the Brownfield Amendments. In order to incentivize the

10. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 236 (2002) (emphasis added).

11. 42 U.S.C. § 9607(r)(1) (2002).

12. 42 U.S.C. § 9601(40)(A)-(H) (2002).

13. 42 U.S.C. § 9601(40)(D) (2002).

14. 42 U.S.C. § 9607(b) (2002).

15. 42 U.S.C. § 9607(b) (2002).

16. *PCS Nitrogen v. Ashley II*, 714 F.3d 161 (4th Cir. 2013).

17. *Id.*

18. *Id.*

redevelopment of brownfields, the Environmental Protection Agency, or Congress, should redefine the standard of care as one that imposes less stringent duties on the prospective purchaser than due care. Appropriate care should require the party asserting the BFPP defense to take the *minimal* steps necessary to prevent imminent releases, cut off exposure pathways, and stabilize existing conditions when these modest, immediate measures could prevent the conditions from worsening. An appropriate care standard that is less stringent than due care better effectuates the policy goals of the Amendments and redevelopment of contaminated properties in general. A lower standard for appropriate care is also reflective of the quasi-utilitarian approach of many federal environmental statutes.

If no action is taken to change the standard for imposing liability, developers may be less inclined to undertake voluntary redevelopment of contaminated properties if the risk of becoming liable as a PRP is uncertain and not well defined.¹⁹ A different standard can act as yet another tool to encourage private developers to take on redevelopment of brownfields and, consequently, can provide economic benefits to the local community, help reduce urban blight and urban sprawl, and protect greenfields.²⁰ For the foregoing reasons, the better policy choice for promoting redevelopment of brownfields, and consequently lowering the brownfield inventory, is a duty of care that is less than the due care standard under CERCLA.

First, a brief discussion of *PCS Nitrogen v. Ashley II* will be used as an entry point to examine the appropriate care standard under the BFPP defense in CERCLA. Second, background on CERCLA liability schemes and the Brownfields Amendments will be provided. Third, an argument will be made in support of a lesser standard for appropriate care using the history of the Brownfields Program and the Amendments, the need to incentivize development of brownfields, and how a different standard is harmonious with other environmental statutes in the United States. Along with that discussion, limitations to this proposal's incentivizing of brownfields development will also be discussed. Finally, this paper will address counterarguments to this new, proposed standard of care.

19. That party would lack knowledge sufficient to know the extent and thoroughness of cleanup it must conduct at each stage of the redevelopment after acquisition of the facility.

20. A "greenfield" is simply land that is undeveloped. Unlike a brownfield, greenfield development occurs on undeveloped land. See *Greenfield*, MERRIAM WEBSTER, <http://www.merriam-webster.com/dictionary/greenfield> (last visited October 25, 2014).

II. THE CASE: PCS NITROGEN V. ASHLEY II

In *PCS Nitrogen v. Ashley II*, the Fourth Circuit became the first federal court to interpret the scope of “appropriate care” under the BFPP defense. Understandably, developers and environmental lawyers watched this case closely because of the liability ramifications.²¹

The case involved the current site owner, Ashley II (Ashley), bringing a cost recovery action against PCS Nitrogen, Inc. for costs it incurred in hazardous waste cleanup at a former fertilizer-manufacturing site.²² It was not disputed that Ashley incurred cleanup costs of hazardous substances.²³ The two parties disputed which one was liable as potentially responsible parties (PRP) for cleanup costs of the hazardous wastes at the site.²⁴ The district court, in a bifurcated trial, held PCS Nitrogen as a PRP in the first trial.²⁵ Along with other parties, Ashley was also found liable as a PRP and was allocated a portion of the response costs.²⁶ Ashley appealed the ruling.

At the first trial, the district court found that Ashley failed to establish a number of the eight required criteria for the defense.²⁷ The district court held that Ashley’s failure to clean, fill, and cap sumps as well as remove, monitor, or adequately address certain debris resulting from the demolition of structures on site did not constitute “appropriate care.”²⁸ Ashley’s own expert admitted that the sumps should have been filled a year before they actually were, and this delay was not the action that a “similarly situated reasonable and prudent person would have taken.”²⁹

On appeal, the Court reviewed Ashley’s BFPP defense. In particular, the issue of whether Ashley exercised “appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to (i) stop any continuing release; (ii) prevent any threatened future release; and

21. *4th Circuit Hears Oral Argument on Ashley II Case*, SCHNAPF LLC (Jan. 4, 2013), www.environmental-law.net/2013/01/4th-circuit-hears-oral-argument-on-ashley-ii-case/.

22. *PCS Nitrogen v. Ashley II*, 714 F.3d 161, 167 (4th Cir. 2013) [hereafter, “*Ashley II*”].

23. *Id.* at 172.

24. *Id.* at 167.

25. *Id.* The original operator of the ammonia and fertilizer plant at the site was Columbia Nitrogen Corporation (“Old CNC”). “New CNC” was a corporation that purchased the plant on June 30, 1966. PCS Nitrogen, through a series of mergers and acquisitions, was a successor to New CNC. PCS Nitrogen was a PRP by virtue of being a successor to New CNC. *Id.* at 169-73.

26. *Id.*

27. *Id.* at 180-81.

28. *Id.* at 180.

29. *Id.* at 181 (citing *New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2d Cir. 1996) (deciding whether a party “took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.”)).

(iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance.”³⁰ Ashley reiterated the argument presented at trial that courts should apply a lesser standard of care under appropriate care than due care.³¹ Ashley supported its contention based on the purposes of the Brownfields Amendments, which was to promote voluntary cleanup of contaminated property.³² Ashley argued that “landowners will not undertake voluntary brownfields redevelopment for fear of becoming fully liable for cleanup costs as a result of minor mistakes that may not even contribute to harm at the facility.”³³

In the end, the Court rejected Ashley’s argument and upheld the District Court’s ruling. The Court’s reasoning compared the “reasonable steps” requirement found in both the innocent landowner defense and the BFPP defense.³⁴ The Court, relying on an Environmental Protection Agency (EPA) guidance document, held that appropriate care was at least as stringent as due care.³⁵ According to the EPA guidance, the “reasonable steps” required under appropriate care is “consonant with traditional common law principles and the existing CERCLA ‘due care’ requirements.”³⁶ These “reasonable steps,” according to the Court, required Ashley to fill the sumps earlier than it did in order to “prevent any threatened future release.”³⁷

Interestingly, the Court speculated that the BFPP appropriate care mandate might require a *higher* standard of care than due care under the innocent landowner defense.³⁸ Logic, the Court reasoned, would suggest that a landowner or developer acquiring property that is *known* to be contaminated with hazardous substances should be held to a higher standard of care.³⁹ By contrast, an innocent landowner, who, by definition, is not aware of the presence of hazardous substances prior to acquisition of the facility, should be held to the lower standard.⁴⁰

30. *Id.* at 180 (citing 42 U.S.C. § 9601(40)(D) (2002)).

31. *Id.* at 180.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* (citing *Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability*, U.S. ENVTL. PROT. AGENCY (Mar. 6, 2003), <http://www2.epa.gov/sites/production/files/documents/common-elem-guide.pdf>).

37. *Supra* note 22, at 181.

38. *Id.* at 180.

39. *Id.*

40. *Id.*

While the Court likely reached the correct holding in light of EPA guidance and the facts of the case⁴¹, a standard for appropriate care that is more stringent than due care is inapposite to the purposes of the Brownfields Amendments and the BFPP defense.⁴² Ashley correctly notes that a higher standard of care, or simply a lack of clear limits on what implicates liability, undermines the goals of the Amendments and discourages redevelopment of brownfields.⁴³

III. CERCLA, THE BROWNFIELDS PROGRAM, AND THE BROWNFIELD AMENDMENTS

A. The Comprehensive Environmental Response, Compensation, and Liability Act

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) provides a federal statutory mechanism for the response, cleanup, and imposition of liability for hazardous waste sites and emergency releases of hazardous substances.⁴⁴ CERCLA permits the EPA and other entities to clean up sites and seek out PRPs for costs when the PRP either fails to clean up the contamination or cannot be located.⁴⁵ CERCLA imposes strict liability, joint and several.⁴⁶ The legal classification of Potentially Responsible Parties (PRPs) covers a broad category of individuals, including an owner and operator of a facility and any person “who by contract, agreement, or otherwise arrange for disposal ... of hazardous substances[.]”⁴⁷

Ordinarily, a prospective purchaser with knowledge of the contamination is liable as a PRP once it acquires the property because it now owns or operates a contaminated facility (e.g., a brownfield). Additionally, under CERCLA’s strict liability scheme, the real estate

41. The District Court of South Carolina found that Ashley failed to establish by the preponderance of the evidence another of the eight criteria for the BFPP defense. Specifically, Ashley did not show sufficient evidence that no disposals occurred at the site after Ashley’s acquisition of the facility. *See Ashley II of Charleston, LLC v. PC Nitrogen, Inc.*, 791 F. Supp.2d 431, 499 (D.S.C. 2011).

42. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 236 (2002).

43. *Ashley II*, 714 F.3d at 167.

44. *Summary of CERCLA (Superfund)*, EPA.GOV, (Mar. 16, 2014), www.epa.gov/laws-regulations/summary-comprehensive-environmental-response-compensation-and-liability-act; 42 U.S.C. §§ 9601-9614 (1980).

45. *Id.*

46. *United States v. Monsanto Co.*, 858 F.2d 160, 167, 171-72 (4th Cir. 1988).

47. 42 U.S.C. § 9607(a) (1991).

transaction through which the BFPP acquires the brownfield may constitute a “contract” by which the purchaser becomes a PRP.

B. The Brownfields Program: pre-Amendments

The EPA Brownfields Program started in 1995 as a means to “empower states, communities, and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse brownfields.”⁴⁸ The EPA sought to encourage brownfield development through a number of different mechanisms, including providing grant money to local governments.⁴⁹ Additionally, the EPA sought to encourage private development through the use of Prospective Purchaser Agreements (PPAs).⁵⁰ The PPAs were negotiated between the agency and private parties and included a covenant not to sue the prospective purchaser of the brownfield.⁵¹ Without a PPA, a private developer risked liability through a number of ways, including merely being an owner or a party to a real estate transaction.⁵² CERCLA’s uncertain liability scheme is recognized as a major deterrent to potential investors in brownfields.⁵³ The PPAs were criticized as being ineffective and cumbersome because they were subject to public comment and closely scrutinized by the EPA, thus leading to lengthy delays in finalization.⁵⁴ The PPAs were project-specific,⁵⁵ thus tying up agency and developer resources for each proposed project.

However, PPAs were largely the only means by which a private developer could mitigate the disincentives and risks associated with

48. *Basic Information, Brownfields and Land Revitalization*, EPA.GOV, www.epa.gov/brownfields/basic_info.htm (last updated July 16, 2012).

49. *Id.*

50. Announcement and Publication of Guidance on Agreements With Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34732, 34792-34798 (July 3, 1995), available at www.gpo.gov/fdsys/pkg/FR-1995-07-03/pdf/95-16282.pdf.

51. *Id.*

52. 42 U.S.C. § 9607(a) (1991).

53. Flannary P. Collins, *The Small Business Liability Relief and Brownfields Revitalization Act: A Critique*, 13 DUKE ENVTL. L. & POL’Y F. 303 (2003) (citing 147 CONG. REC. S3,879, S3,892 (daily ed. Apr. 25, 2001) (statement of Sen. Boxer)).

54. Casey Cohn, *The Brownfields Revitalization and Environmental Restoration Act: Landmark Reform or a “Trap for the Unwary”?*, 12 N.Y.U. ENVTL. L.J. 672, 679-80 (2004). See also Gregory D. Trimarche, Commentary, *CERCLA’s New Prospective Purchaser Defense*, 23 NO. 9 ANDREWS HAZARDOUS WASTE LITIG. REP. 12 (2002) (discussing a number of the criteria that was required before a PPA was approved, including a substantial likelihood of federal response at the site, the PPA had to result in a “substantial public benefit,” the development could not exacerbate any existing contamination, and others.).

55. Gregory D. Trimarche, Commentary, *CERCLA’s New Prospective Purchaser Defense*, 23 NO. 9 ANDREWS HAZARDOUS WASTE LITIG. REP. 12 (2002).

brownfield redevelopment.⁵⁶ Without a PPA covenant not to sue, a private developer could become liable without contributing any contamination at the site.⁵⁷ Consequently, these PPAs did not have the desired effect of increasing and incentivizing development of brownfields. Developers might, instead, seek to develop on greenfields.⁵⁸ Greenfields development, in turn, increases urban sprawl and reduces tax revenues to the municipality.⁵⁹ One author notes that this issue raises environmental justice concerns as well, due to the fact that abandoned or unused brownfields are usually located in economically depressed communities.⁶⁰ The EPA, faced with the administrative burden of negotiating PPAs and the desire to encourage brownfield redevelopment, supported legislative action to address these problems.⁶¹

C. The Brownfields Amendments

In 2002, President Bush signed the Small Business and Brownfields Revitalization Act into law.⁶² The law's purpose is to "provide certain relief for small businesses from liability under [CERCLA], and to *amend such Act to promote the cleanup and reuse of brownfields[.]*"⁶³ This law amended portions of CERCLA, and notably, clarified certain liability defenses, including the addition of the BFPP liability defense.⁶⁴

The Senate, in committee discussions on the proposed amendment, reported general findings of fact that included estimates of between 600,000 and 1,000,000 brownfield sites in the U.S.⁶⁵ Greenfields faced increased development pressures in rural areas as prospective purchasers sought to avoid CERCLA liability associated with brownfields.⁶⁶ The presence of brownfields in urban areas causes blight and increased

56. Collins, *supra* note 53, at 309.

57. *Id.*

58. Collins, *supra* note 53, at 303.

59. *Id.*

60. *Id.* (discussing the problem of "mothballing" properties, i.e., leaving sites unremediated).

61. See *infra* Part IV.B. See also Trimarche, *supra* note 55 (stating that "To a large extent, the new prospective purchaser defense is simply an outgrowth of the EPA's old administrative policy on prospective purchaser agreements... as anyone who has negotiated a PPA can attest, these project-specific PPAs were quite cumbersome to negotiate, and often created as many problems as they solved").

62. *Laws & Statutes, Brownfields*, EPA.GOV, <http://www.epa.gov/brownfields/laws/index.htm> (last updated July 16, 2012); Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

63. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002) (emphasis added).

64. *Id.*; 42 U.S.C. §§ 9601(40) (2002), 9607(q)(1)(C) (2002).

65. S. REP. NO. 107-244, at 2 (2002).

66. *Id.*

environmental and human health risks in those communities, especially those that were already disproportionately affected.⁶⁷ The Senate sought to encourage brownfields development because it recognized the benefits to local communities, such as utilizing already-existing city infrastructure, adding to the local tax base, attracting new businesses and jobs, and relieving the development pressures on greenfields.⁶⁸ Additionally, the Senate specifically noted that developers avoid brownfields, including “abandoned sites, even those with little or no contamination,” because the risk of being held liable for the full cost of the remediation under CERCLA exceeded the property value of the site.⁶⁹

The BFPP liability defense permits a developer to knowingly purchase a contaminated facility while avoiding liability as a PRP, provided the developer acquires the facility after January 11, 2002 and the BFPP establishes eight criteria by a preponderance of the evidence.⁷⁰ This is a defense against any action for cost recovery by any other PRP, given the strict, joint and several liability nature of CERCLA. The BFPP defense was largely considered “an outgrowth of the EPA’s old administrative policy on [PPAs].”⁷¹

Prior to the amendments, if a PPA was not secured, the main defense against CERCLA liability was the innocent landowner defense.⁷² However, a brownfield by definition is a contaminated site, and, thus, this defense was of no use to a developer who wished to voluntarily develop a brownfield. The innocent landowner defense, as opposed to the BFPP defense, requires the party claiming the defense to exercise due care with regard to the release of hazardous substances caused by “an act or omission of a third party other than an employee or agent of the defendant ... taking into consideration the characteristics” of said substance “in light of all relevant facts and circumstances.”⁷³

The addition of the BFPP defense created another means by which a developer or landowner could avoid CERCLA liability. However, the use

67. S. REP. NO. 107-2, at 1-2 (2001)(disproportionately affected communities implicate environmental justice issues).

68. *Id.*

69. *Id.*

70. 42 U.S.C. § 9601(40)(A)-(H) (2002); 42 U.S.C. § 9607(q)(1)(C) (2002). The BFPP defense, of course, is only raised if and when another party brings a cost recovery action against the prospective purchaser under CERCLA.

71. Trimarche, *supra* note 55.

72. See generally Keith H. Johnson, Overview of the Small Business Liability Relief and Brownfields Revitalization Act, P.S. Publications (Jan. 1, 2004), available at <http://www.poynerspruill.com/publications/pages/overviewofthesmallbusinessliabilityreliefandbrownfieldsrevitalizationact.aspx>.

73. 42 U.S.C. § 9607(b) (2002).

of appropriate care within the BFPP defense caused some confusion among attorneys and developers.⁷⁴ Initial speculation ran from appropriate care imposing a higher standard of care than due care, to a lower standard of care. This uncertainty regarding the level of care required under “appropriate care” only increased uncertainty surrounding potential liability under CERCLA.⁷⁵

If developers believed that appropriate care would require a higher standard of care than due care, or if appropriate care was an uncertain standard, then logically they would continue to rely on PPAs, even if they were cumbersome. At the very least, a PPA guaranteed protection from CERCLA liability. Appropriate care, at the time of the Amendments and for some time thereafter, was an unknown variable for prospective purchasers.

The EPA issued guidance on the Amendments, relied on by the Fourth Circuit in *Ashley II*⁷⁶, that sought to clarify the BFPP, innocent landowners, and contiguous property owner limitations on liability.⁷⁷ The guidance recognized congressional intent to incentivize owners of contaminated property by providing additional defenses to CERCLA liability.⁷⁸ By “acting responsibly” in the presence of hazardous substances, certain owners could avoid placement into the PRP pool.⁷⁹ It is odd then that, according to the EPA, this liability defense does nothing more than adopt already existing “due care” principles. The only meaningful difference between these two guidelines is that the BFPP knows the property is contaminated prior to purchase, and the innocent landowner does not, despite exercising due diligence prior to acquisition.

However, even with EPA guidance, the scope of appropriate care was still largely unknown as no federal court made a definitive ruling on it prior to the Fourth Circuit in *Ashley II*.⁸⁰

74. Cohn, *supra* note 54, at 699.

75. Collins, *supra* note 53, at 323.

76. *Ashley II*, 714 F.3d at 180; *Supra* note 36.

77. U.S. ENVTL. PROT. AGENCY, Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability (Mar. 6, 2003) [hereinafter, EPA Mar. 6, 2003 Guidance].

78. *Id.*

79. *Id.*

80. Although, I would argue that *Ashley II* did not reach a definitive ruling on the level of care required because the facts relied upon by *Ashley* to establish the BFPP defense were unfavorable. Namely, *Ashley*'s own expert's admittance that sumps should have been filled in a year before it was actually done. See *supra* note 30.

IV. THE NEED FOR CLARITY: LOWERING THE STANDARD OF CARE FOR BFPPS

The EPA, or Congress, should redefine the standard for appropriate care as one that imposes less stringent duties on the prospective purchaser than due care. This lesser standard of care is consistent with the purpose of the 2002 amendments, helps to incentivize private development of brownfields, and reflects the quasi-utilitarian nature of many federal environmental statutes. This lower standard will ease pressure on greenfield development while continuing to promote the benefits of the Brownfields Program.

A. *New Standard for Appropriate Care*

Appropriate care should be a lower standard than due care under the Brownfields Amendments and CERCLA. At the very least, a defined and clear standard of care provides some certainty in the risky area of private brownfield development and makes an important distinction between the two standards of care cited within CERCLA. Appropriate care should require a property owner (i.e., the prospective purchaser) to take the *minimal* steps necessary to prevent imminent releases, cut off exposure pathways, and stabilize existing conditions when these modest, immediate measures could prevent exacerbation of hazardous conditions. This level of care would require parties claiming the BFPP defense to show by the preponderance of the evidence that they did not make the situation worse, while not necessarily requiring them to conduct a full-scale cleanup at the initial stages of remediation and development. Alternately, appropriate care should require the prospective purchaser to adhere to the performance mandates as dictated by a relevant state agency.⁸¹ The relevant state agency would establish performance mandates that the prospective purchaser must follow in order to receive liability protection.

In *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, the U.S. District Court for the Central District of California addressed the question of whether the plaintiff exercised appropriate care as a BFPP when the defendant, asserting that the plaintiff was a PRP, brought a counterclaim for cost recovery.⁸² In that case, the plaintiff worked with the California Department of Toxic Substances (DTSC) on a coordinated voluntary cleanup of a contaminated property purchased by the plaintiff in 2006.⁸³

81. An example is provided in the case discussion that follows this paragraph.

82. *3000 E. Imperial, LLC v. Robertshaw Controls Co.*, CV 08-3985 PA EX, 2010 WL 5464296 (C.D. Cal. Dec. 29, 2010).

83. *Id.* at 1, 11.

The property was a former manufacturing site with underground storage tanks (USTs).⁸⁴ The plaintiff knew the site was contaminated prior to purchase.⁸⁵ An environmental consulting firm that was hired by the plaintiff to investigate the contamination concluded that the groundwater was contaminated.⁸⁶ The Court recognized that the California Health and Safety Code mirrored CERCLA's BFPP definition.⁸⁷ However, the California statute defined "appropriate care" as merely requiring a BFPP to adhere to the response actions directed by DTSC—a narrower requirement.⁸⁸

In *300 E. Imperial*, the issue was whether the plaintiff's two-year delay in removing the USTs was "unreasonable" and, thus, violative of "appropriate care."⁸⁹ The Court found that draining the USTs of contaminants was a "reasonable step" towards stopping any continuing leak and preventing future leaks.⁹⁰ The defendant, Whittaker Corporation, argued that the USTs should have been excavated after draining in order to prevent "surface water infiltration."⁹¹ The Court held that it was not "unreasonable," as the defendant urged, for the plaintiff to leave the USTs in the ground for upwards of two years.⁹² The plaintiff was entitled to the BFPP liability defense because the sampling and draining of the USTs constituted "appropriate care."

Applying the Court's analysis in the *3000 E. Imperial, LLC* case to the *Ashley II* case, it is arguable that the exercise of appropriate care would merely require Ashley to take reasonable steps to prevent the sumps from leeching and ensuring that the debris did not leave the premises. Ashley could simply take minimal steps to control or contain the storm-water filled sumps, rather than conduct a full remediation as could be required under due care. Appropriate care, under the proposed standard, would require Ashley to not make the situation worse, but the standard will not go so far as to demand full remediation at the initial stages of redevelopment. In *3000 E. Imperial, LLC*, the plaintiff conducted the necessary environmental investigation upon acquiring the site, and drained the USTs. The plaintiff did not immediately or within the first year remove the USTs from underground. Similarly, Ashley, under the proposed

84. *Id.* at 1.

85. *Id.*

86. *Id.*

87. *Id.* at 11.

88. *Id.*

89. *Id.*

90. *Id.* at 12.

91. *Id.*

92. *Id.*

standard, could simply act to prevent contaminated sump water from leeching or spilling during the initial stages of redevelopment and keep debris from spreading. By preventing the conditions at the site from significantly deteriorating, Ashley would avoid PRP liability.

B. The Purpose of the Amendments

The proposed lesser standard for appropriate care also finds some support in the legislative history leading up to the enacting of the Brownfields Amendments. First, the very purpose of the Amendments was to “promote the cleanup and reuse of brownfields.”⁹³ The EPA supported the Amendments because, presumably, the new BFPP defense would eliminate or reduce the need for PPAs, which were burdensome and ineffective for encouraging rapid development of brownfields.⁹⁴ If a private developer was choosing between a BFPP defense, which the Fourth Circuit held to require the same level of care as due care, and a PPA, which, although cumbersome to negotiate, guarantees liability defense, logic and rational business judgment would dictate selecting the latter. This result defeats the very purpose of the BFPP defense.

Evidence prior to the adoption of the Brownfields Amendments suggests that a lower standard of care was envisioned. Gregory Trimarche—an attorney specializing in brownfields transactions and environmental litigation as well as writing about the Amendments—reported on discussions he had with a “senior EPA official.”⁹⁵ The official “indicated a belief that the new appropriate-care standard should be read simply as requiring the new owner to take the minimal steps necessary to prevent imminent releases, cut off exposure pathways, and stabilize existing conditions when modest, immediate measures could prevent” an exacerbation of the contamination.⁹⁶ Trimarche’s interpretation was that appropriate care could be read to merely require preventing “a bad situation from becoming worse.”⁹⁷ Indeed, for some time preceding the Amendments, there appeared to be a few legislators willing to wholly exempt prospective purchasers from any CERCLA liability.⁹⁸

93. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

94. Trimarche, *supra* note 55.

95. *Id.*

96. *Id.*

97. *Id.*

98. See 141 CONG. REC. E1623 (daily ed. Aug. 3, 1995) (statement of Rep. Robert Borski) (“The bill also includes protection for prospective purchasers—people who want to buy property but may be scared away by the potential liability. Under this bill, prospective purchasers who have no connection with the waste disposal will be shielded from liability.”); 141 CONG. REC. E1622 (daily ed. Aug. 3,

The EPA's March 6, 2003 guidance on the new CERCLA liability defenses interprets the "reasonable steps" required of contiguous landowners, BFPPs, and innocent landowners as "consonant with traditional common law principles and the existing CERCLA 'due care' requirement."⁹⁹ However, according to the EPA, these "reasonable steps" may differ depending on the type of liability defense asserted.¹⁰⁰ EPA describes these "reasonable steps" as reflecting the balance Congress sought between liability protection for types of landowners and protection of human health and the environment.¹⁰¹ Additionally, the EPA noted that "due care" under the pre-Brownfields Amendments CERCLA liability differs from the "reasonable steps" required under the Brownfields Amendments.¹⁰² "Due care," according to the EPA, is a "reference point for evaluating the reasonable steps requirement."¹⁰³

The purported goals of the Amendments were, in part, to encourage development of brownfields and alleviate the fear of CERCLA liability.¹⁰⁴ The EPA guidance indicates a lack of clearly defined steps for the standard of care required under the Brownfields Amendments. Instead, whether "due care" or "appropriate care," a private developer¹⁰⁵ may only rely on reference points as to what "reasonable steps" it must take in the presence of hazardous substances. One can imagine the scenario in which a private developer takes what it believes to be appropriate "reasonable steps" only

1995) (statement of Rep. Richard Gephardt) ("...this legislation provides protection for good faith prospective purchasers...Under Superfund, the owner of a contaminated tract of land may be held responsible for cleaning it up even if the pollution was created by the prior owner. Thus, potential purchasers are often deterred from investing in sites with potential contamination. This provision allows a purchaser who checks the site carefully before purchase to avoid liability...") [Rep. Gephardt discusses both "good faith prospective purchasers" and "innocent landowners" and uses the terms somewhat interchangeably.]; Katherine X. Vasiliades, *Encouraging Industry in Order to Preserve Non-Commercial Property*, 9 VILL. ENVTL. L.J. 29, 53-55 (1988) (discussing Sen. Smith's introduction of the Accelerated Cleanup and Environmental Restoration Act of 1995 "as a bill to reauthorize and amend CERCLA... the bill protected purchasers from liability provided the purchaser conducted satisfactory inquiries prior to purchaser of the property and did not exacerbate the contamination.").

99. U.S. ENVTL. PROT. AGENCY, *supra*, note 77.

100. *Id.* (stating that "The reasonable steps determination will be a site-specific, fact-based inquiry.").

101. *Id.*

102. *Id.* ("CERCLA requires the exercise of 'due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substance, in light of all the relevant facts and circumstances; CERCLA § 107(b)(3)(a).").

103. *Id.*

104. S. REP. NO. 107-2, at 2 (2001).

105. A private developer who was aware of the presence of hazardous substances would seek BFPP liability protection ("appropriate care"). The innocent landowner liability defense would apply to the private developer that did not know of the presence of hazardous substances despite making the appropriate inquiries ("due care").

to come under CERCLA liability as a PRP through a later “site-specific, fact-based inquiry,”¹⁰⁶ thus providing no greater level of confidence for the private developer seeking to redevelop a brownfield.¹⁰⁷

C. Incentivizing Brownfields Development

A new, lower standard for appropriate care will incentivize development through the removal of a tricky variable within the brownfields development calculus. The Senate recognized that “abandoned sites, even those with little or no contamination” are left unremediated due to “fear that cleanup costs could exceed the property value [and] reduce incentives for redevelopment.”¹⁰⁸ The potential high costs of cleanup, in addition to the fear of CERCLA liability, are “primary factors” that drive developers towards the less risky greenfields.¹⁰⁹ The liability risks also prevent willing developers from obtaining necessary loans and insurance.¹¹⁰

By clearly defining the limits of appropriate care to be a lesser standard than due care, loan providers and insurers are provided a greater guarantee that the project is not likely to result in costly litigation and recovery costs. Additionally, developers are provided some assurance that voluntarily taking on a brownfield will not result in liability as long as they do not make the contamination worse. Certainly, it would be in the best interest of the developer to perform a full remediation prior to project completion. A new appropriate care standard can at least prevent costly liability during the initial stages of project development.

D. Harmony with Other Federal Environmental Statutes

Lowering the burden for what qualifies as “appropriate care” for CERCLA liability is harmonious with many of the current federal environmental statutes. Statutory programs like the Clean Air Act (CAA) and the Clean Water Act (CWA) reflect a quasi-utilitarian approach to environmental problems. Utilitarianism is a philosophy that provides, in basic terms, that the “morally good action is one that helps the greatest

106. U.S. ENVTL. PROT. AGENCY, *supra*, note 77 (stating that “The reasonable steps determination will be a site-specific, fact-based inquiry.”).

107. Frank B. Cross, *Bona fide prospective purchaser exemption*, 1 Fed. ENVIR. REG. OF REAL ESTATE § 2:51 (2014) (“...what constitutes due care for purposes of the [BFPP] exemption will likewise require a case-by-case analysis of the particular facts and circumstances.”).

108. S. REP. NO. 107-2, at 2 (2001).

109. *Id.*

110. *Id.* at 2-3.

number of people.”¹¹¹ In other words, an action is proper when the consequences of that action benefit the greatest number of people. Utilitarianism can be described, in the context of environmental regulation, as a cost-benefit analysis in that weighs the cost of preventing pollution with the benefits to human health and the environment. The CAA and the CWA, two major federal environmental statutes, illustrate this cost-benefit analysis.

The CAA, in part, regulates the emissions of air pollutants from stationary and mobile sources.¹¹² The CAA does not, however, prohibit all emissions of air pollutants. Rather, sources of air pollutants must comply with the CAA by obtaining permits, which set the effective emissions limits for that source.¹¹³ Part C of the CAA requires a preconstruction permit for a proposed facility to be subject to the best available control technology (BACT) for regulated air pollutants.¹¹⁴ The EPA, or other permitting authority, sets BACT on a case-by-case basis by considering “energy, environmental, and economic impacts and *other costs*...”¹¹⁵ Best available control technology explicitly mandates a type of cost-benefit analysis. The statute does not require the most stringent emissions limit technology. Rather, it only requires that the permitting authority set the BACT for each applicant by weighing environmental and economic impacts along with other costs. The CAA reflects a conscious decision by policymakers to incorporate a cost-benefit analysis in determining emissions limitations, rather than a broad, strict standard of care.

The CWA, by regulating the effluent emission into waterways, also implements a similar permitting program for discrete, point sources.¹¹⁶ The CWA, like the CAA, does not prohibit all pollution. It only sets emissions limits for pollution sources. The National Pollutant Discharge Elimination System (NPDES) allows the EPA to issue permits for the discharge of any pollutant, provided certain conditions are met.¹¹⁷ The NPDES permitting program does not prohibit *any* pollutant discharge. Rather, it permits *some* if other certain statutory conditions are met.

111. *Utilitarianism definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/utilitarianism> (last visited Mar. 15, 2014).

112. 42 U.S.C. §§ 7401-7431 (1970).

113. *See* Prevention of Significant Deterioration of Air Quality, 42 U.S.C. § 7470-7479 (1977); Plan Requirements for Nonattainment Areas, 42 U.S.C. § 7501-7509(a) (1977); and Title V Permits, 42 U.S.C. § 7661-7661(f) (1990).

114. 42 U.S.C. § 7475(a)(4) (1977).

115. 42 U.S.C. § 7479 (C)(3) (1977) (emphasis added).

116. *See generally*, *Summary of the Clean Water Act*, EPA.GOV, <http://www2.epa.gov/laws-regulations/summary-clean-water-act> (last updated Mar. 16, 2014).

117. 33 U.S.C. § 1342(a) (1972).

Relatedly, the Supreme Court ruled that the EPA is permitted to conduct a cost-benefit analysis for regulations promulgated under § 1326 of the CWA.¹¹⁸ In *Entergy Corp. v. Riverkeeper*, petitioners challenged EPA regulations that “permit the issuance of site-specific variances from national performance standards if a facility can demonstrate either that the costs of compliance are ‘significantly greater than’ the costs considered by the agency in setting the standards, or that the costs of compliance ‘would be significantly greater than the benefits of complying with the applicable performance standards.’”¹¹⁹ The EPA’s regulations, upheld by the Court, were based on its interpretation that the statutory requirement of “best technology available” permitted consideration of technology cost against the environmental benefits produced.¹²⁰ The EPA did not have to select the “best technology available” based only on the environmental benefits produced. It was permitted to weigh those environmental benefits against the costs to the facility.

Similarly, lowering the standard of care under appropriate care for BFPPs reflects a policy choice: weighing the benefits of further incentivizing brownfields against the potential human health and environmental risks associated with implementing the new standard. Namely, the risks of orphaned brownfields for which there are no PRPs available for cost recovery, and the delays in full remediation at the site are weighed against the harms of leaving a brownfield site unclaimed and undeveloped. The reported rationale underlying the Amendments¹²¹ is weighed against the risks of implementing the new standard. If brownfield development is important, then other development incentives should be considered. The benefits of increased brownfields development¹²² outweigh the risks of harm stemming from the lowered standard.

D. The Limitations

Of course, lowering the standard of care for BFPPs may not result in any increase in brownfields development. After all, a BFPP defense requires a prospective purchaser to establish eight criteria by the preponderance of the evidence.¹²³ Simply changing one criterion will not prevent a developer from becoming liable under CERCLA. Further, a prospective purchaser *voluntarily* acquires a contaminated site. A new

118. *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009).

119. *Id.* at 216.

120. *Id.* at 217-18.

121. *See supra* Part IV.B.

122. *See supra* Part III.C.

123. 42 U.S.C. § 9601(40)(A)-(H) (2002).

appropriate care standard may not affect the cost-risk calculation for the developer, especially when the developer would still conduct a full cleanup as a prudent business practice or still seek a PPA. Finally, there are many other variables that could affect brownfields development, including loan and insurance availability, profit projections, and other standard business considerations.

V. CRITIQUES

Many criticisms likely exist towards this development-developer friendly approach for brownfields redevelopment. There are many more than were contemplated or that can be addressed in this article. However, I will attempt to counter a few notable criticisms of this suggested approach.

One question that may arise is what justifies the different treatment of innocent landowners and BFPPs. An innocent landowner, by definition, does not cause or contribute to the contamination, nor does the innocent landowner know of the presence of hazardous substances.¹²⁴ The difference in treatment is easily resolved if the purpose of the lower standard of care under appropriate care is to encourage developers to knowingly take on brownfields development. The reward for voluntarily acquiring brownfields is that the developer is less likely to become a PRP absent some egregious or patently deficient action. The prospective purchaser knows it is purchasing a brownfield¹²⁵ and will, as any prudent business or person would do, ensure a full remediation by the end of the project. Prior to completion of the project, liability should not attach nor should the developer be compelled to assert the defense. An innocent landowner may have no intention of conducting a redevelopment or full remediation of the site.¹²⁶ The prospective purchaser, conversely, *knows* the site is contaminated and should not face the penalty of becoming a PRP unless and until the project is completed.

Some may argue that lowering the standard of care would reward potentially substandard remediation efforts. However, the lesser standard under appropriate care would not provide a developer with complete protection from liability. For example, a developer who purchases a brownfield but does not take the modest or minimal steps necessary to prevent the spread of hazardous substances would receive no protection against PRP liability even under the new standard. This type of action is

124. See *supra* note 70.

125. Which is, by definition, contaminated with hazardous substances.

126. This is inherent in the definition of the innocent landowner defense.

akin to taking no action. Further, a developer faces other avenues of liability even if the standard of care is lowered. First, as was the case in *Ashley II*, Ashley failed to establish all of the eight criteria required for the BFPP defense.¹²⁷ Even if Ashley exercised appropriate care under a lower standard, it failed to establish all of the BFPP criteria by a preponderance of the evidence.¹²⁸ A lesser standard of appropriate care does not equate to no liability under the BFPP defense. Second, a developer may still face toxic tort liability¹²⁹, any state hazardous waste laws, or liability under the Resource, Conservation, and Recovery Act (RCRA) citizen suit provision, amongst others.¹³⁰

One final hurdle towards implementing a lesser standard is the informal EPA practice of preferring “one man left standing” for brownfields,¹³¹ which seeks to ensure that the present site owner, or some party, will perform a full remediation rather than leaving the site orphaned.¹³² Providing a means for avoiding liability to purchasers may leave brownfields without a known PRP.¹³³ This should be of little concern if the goal of the Amendments is to promote the reuse of brownfields. A prospective purchaser taking on a brownfield would ensure that full cleanup at the site would occur prior to project completion or engaging in a subsequent real estate transaction to prevent PRP liability.¹³⁴ Consequently, there should be less incentive by the EPA to seek out other parties for recovery costs.

127. 42 U.S.C. § 9601(40)(A)-(H) (2002) (listing the criteria as follows: whether all disposals of hazardous substances occurred before acquisition; performing all appropriate inquiries; making all legally required notices; exercising appropriate care; providing full cooperation, assistance and access to authorized response persons; compliance with land use restrictions and to not impede any institutional control at the site; compliance with requests and subpoenas; and having no affiliation with a PRP).

128. *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp.2d 431, 499 (D.S.C. 2011) (Ashley failed to show that no disposals occurred on the site after Ashley’s acquisition).

129. A common law claim. *See generally* N. Kathleen Strickland, *Toxic Torts: An Overview*, GP SOLO LAW TRENDS & NEWS REAL ESTATE (May 2005), www.americanbar.org/newletter/publications/law_trends_news_practice_area_e_newsletter_home/toxictorts.html.

130. 42 U.S.C. § 6972 (1980). However, no action may be commenced if the Administrator or State has commenced a civil or criminal action against the alleged violator, 42 U.S.C. § 6972(b)(1)(B) (1980).

131. Trimarche, *supra* note 55.

132. *Id.*

133. Of course, the BFPP defense is an affirmative one, protecting the site owner from suits from other PRPs for apportionment or contribution of cleanup fees. It may be unlikely that removing the current owner from the PRP pool has any effect on other parties to recover for cleanup costs leaves a site truly orphaned, especially if the current owner does not have to assert the BFPP defense because no other party is seeking to recover cleanup costs against the purchaser.

134. *See supra* Part III.A.

VI. CONCLUSION

Congress or the EPA should act to formally adopt a lower standard of care for appropriate care for BFPPs under the Brownfields Amendments. Appropriate care for BFPPs should impose a less stringent duty than traditional due care under CERCLA and the common law. Appropriate care should require that the property owner or developer take the minimal steps necessary to prevent imminent releases of hazardous substances, cut off exposure pathways, and stabilize existing condition when these modest, immediate measures could prevent a bad situation from becoming worse. In the alternative, appropriate care should be defined as following the performance standards and mandates required by the relevant state agency.

The Fourth Circuit's ruling in *Ashley II*, that appropriate care is synonymous with due care, reflects a poor policy choice in light of the purpose of the Amendments. Granted, federal appellate courts are not where policy choices are made. This job is better left to the elected branches and to the administrative agencies charged with implementing federal statutes.

Congress, in the time leading up to the Amendments, recognized that private developers were not incentivized to voluntarily take on brownfields development. These private developers faced the risk of becoming liable as a PRP under CERCLA, even if only minimally contributing to the contamination. A lower standard of care can ease development pressures off less risky greenfields while still providing the many benefits associated with brownfields program. This new standard is also harmonious with the current quasi-utilitarian nature of federal environmental statutes. The benefits of brownfields redevelopment, including reducing urban blight and urban sprawl, as well as increasing the tax base for the local government, outweigh the interim risk of spreading or exacerbating hazardous contamination. After all, the prudent developer would still perform a full cleanup prior to project completion in order to avoid liability under toxic torts, state hazardous waste laws, and other environmental liability. The lower standard only guarantees that the private developer is less likely to become a PRP through any cost recovery actions during the initial redevelopment stages.

Finally, it is recognized that a lower standard of care is no panacea towards spurring brownfields development. There are many other variables at play that help to determine whether or not a private party will voluntarily take on a brownfield. Doing nothing only maintains the status quo and leaves urban centers blighted. A new standard is one way in which the scales can be tipped in favor of brownfields development.

