BROWNFIELDS REMEDIATED? HOW THE BONA FIDE PROSPECTIVE PURCHASER EXEMPTION FROM CERCLA LIABILITY AND THE WINDFALL LIEN INHIBIT BROWNFIELD REDEVELOPMENT

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INTRODUCTION

Communities across the nation suffer from the negative impacts of abandoned, underused, and potentially contaminated properties called "brownfields."[1] The term "brownfield" generally refers to "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."[2] According to a report prepared for the Environmental Protection Agency (EPA) in 2003 by Environmental Management Support, Inc., the number of brownfields in the United States ranges from 450,000 to 1,000,000.[3] In the early 1990s, the U.S. Conference of Mayors labeled brownfields "one of the most critical problems facing U.S. [c]ities."[4]

The appearance of abandoned properties in metropolitan areas may puzzle the typical uninformed resident. However, property developers, lending institutions, governments, lawyers, environmental agencies, and real estate professionals understand the primary reason for the condition. Developers are "hesitant to redevelop brownfields because of the investment risk and potential liability for cleanup costs."[5]

This uncertainty, which causes apprehension for parties who might otherwise be inclined to redevelop brownfields, is a by-product of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[6] In recognition of the serious impact that the brownfield problem has had, as well as how uncertainty about liability has contributed to the problem, Congress, in 2002, enacted the Small Business Liability Relief and Brownfields Revitalization

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1. ENVTL. MGMT. SUPPORT, INC., U.S. ENVTL. PROT. AGENCY, REUSING LAND RESTORING HOPE: A REPORT TO STAKEHOLDERS FROM THE U.S. EPA BROWNFIELDS PROGRAM (2003) [hereinafter REUSING LAND], *available at* http://www.epa.gov/swerosps/bf/news/stake_ report.htm.

2. 42 U.S.C.A. § 9601(39) (West Supp. 2004).

3. REUSING LAND, *supra* note 1, at 7.

4. *Id.*

5. *Id.*

6. *See generally* Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C.A. §§ 9601-9675. The categories of parties liable for costs under CERCLA, as well as the operation of its liability provisions, are discussed in Part I of this Note.

Act (the "Brownfields Act" or the "Act").[7] In its preamble, the Act asserts as its purpose "to amend CERCLA to promote the cleanup and reuse of brownfields."[8] As a means to accomplish this objective, § 222(b) of the Act creates a "bona fide prospective purchaser (BFPP)" exemption from liability.[9] Under the Act, a BFPP whose CERCLA liability derives from ownership or operation of a facility "shall not be liable as long as the [BFPP] does not impede the performance of a response action."[10]

Persons acquiring ownership of an affected facility after January 11, 2002 may qualify as BFPPs.[11] Section 222(a) of the Act establishes several other conditions for BFPP status, which potential buyers must establish by a preponderance of the evidence.[12] The establishment of these conditions, and the resultant qualification as a BFPP, afford a person immunity from liability.[13] However, critical to the problem presented in this Note is the provision in § 222(b) of the Act, which says that "[i]f there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of [qualifying as a BFPP] . . . the United States shall have a lien on the facility."[14] Therefore, a person might qualify for BFPP immunity under the Act, yet, at the same time, incur liability for the cleanup of the property. Section 222 conditions the government's authority to attach a lien on the property on whether the property's value increases as a result of the cleanup and on whether the government has unrecovered costs from the cleanup.[15] The purpose of the lien provision is apparently to avoid a windfall to the property owner from the cleanup.[16] Nevertheless, the inclusion of this "windfall lien" provision may compromise the Act's purpose of promoting the cleanup and reuse of brownfields.

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7. Small Business Liability Relief and Brownfields Revitalization Act of 2002, Pub. L. No. 107-118, 115 Stat. 2356 (codified as amended at 42 U.S.C.A. §§ 9601, 9604, 9605, 9607, and 9622) [hereinafter Brownfields Act].

8. *Id*. pmbl.

9. Brownfields Act 222(b), 42 U.S.C.A. § 9607(r)(1). The Brownfields Act includes provisions limiting liability for other types of parties, including an exemption for contiguous property owners in section 221, 42 U.S.C.A. § 9607(q), and clarification of the innocent landowner defense in section 223, 42 U.S.C.A. § 9607(b)(3). The bona fide prospective purchaser exemption shares many elements with the liability limitations for contiguous property owners and innocent landowners. This Note focuses on the bona fide prospective purchaser.

10. *Id.* § 9607(r)(1).

11. Brownfields Act § 222(a), 42 U.S.C.A. § 9601(40).

12. *Id*.; *see infra* note 49 and accompanying text.

13. *See* 42 U.S.C.A. § 9607(r)(1).

14. Brownfields Act § 222(b), 42 U.S.C.A. § 9607(r)(2).

15. *See id.* § 9607(r)(3).

16. Notably, the subsection authorizing the lien, § 9607(r), is titled "Prospective purchaser and windfall lien." Apparently, Congress considered the increase in property value a windfall to the property's owner where the owner was exempt from contributing to the government's reimbursement for its cleanup costs.

In addition to the windfall lien provision, the requirements for establishing BFPP status may inhibit the redevelopment of brownfields. This Note surveys the BFPP requirements, pausing to analyze three of the criteria that pose a particular threat to the accomplishment of the Act's goals. The Note also focuses on the windfall lien provision, illustrating how it too may impede effectuation of the Act's purpose, and suggesting certain challenges likely to be made against the provision. First, however, this Note discusses the key components of CERCLA and the 2002 brownfields amendment.

I. POTENTIALLY RESPONSIBLE PARTIES: LIABILITY AND DEFENSES UNDER CERCLA

Observing that the absence of careful planning and management in the disposal of solid and hazardous waste endangers human health and the environment, Congress sought to regulate such wastes from their generation to their disposal through the Resource Conservation and Recovery Act (RCRA).[17] Unfortunately, before Congress had enacted RCRA, hazardous substances already had escaped into the environment, and, even with RCRA's control of the process and manifest intent to regulate wastes, it remained possible that hazardous substances would nevertheless find their way into the environment. As a result, Congress enacted CERCLA in 1980 to address the problem of hazardous waste contamination.[18]

Section 104(a) of CERCLA grants authority to the President to act in response to the release or threatened release of a hazardous substance from a facility into the environment.[19] CERCLA defines the terms "release"[20] and "facility"[21] broadly, and through reference to other statutes, it further defines "hazardous substances" to assume wide-ranging meanings as well.[22] The statute, therefore, enables the government to respond to almost any situation where hazardous substances may have escaped into the environment.[23] Naturally,

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17. Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6922 (2000).

18. *See* CERCLA, 42 U.S.C.A. §§ 9601-9675 (West Supp. 2004).

19. *See* CERCLA § 104(a), 42 U.S.C.A. § 9604(a).

20. *See id.* § 9601(22) (defining "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment").

21. *See id.* § 9601(9) (defining "facility" as "(A) any building, structure, installation, equipment, pipe or pipeline . . . well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located").

22. *See id.* § 9601(14) (defining "hazardous substances" to include oil and associated pollutants and toxic pollutants regulated under the Clean Water Act, hazardous wastes regulated under RCRA, hazardous air pollutants regulated under the Clean Air Act, and imminently hazardous chemicals regulated under the Toxic Substances Control Act).

23. CERCLA does provide some exceptions to its broad definitions. *See, e.g.*, *id.* § 9601(22) (excluding releases regulated under other environmental statutes, engine emissions from various

government cleanups of hazardous waste are expensive. In *B.F. Goodrich v. Betkoski*,[24] the Second Circuit observed that among CERCLA's purposes is the "assur[ance] that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions."[25] Section 107 provides that assurance by granting authority to the government to recover costs from responsible parties.[26]

CERCLA imposes strict liability on four categories of potentially responsible parties.[27] The four categories include: "(1) the owner or operator of a vessel or a facility (current owners and operators); (2) [persons] who at the time of disposal of any hazardous substance owned or operated any facility at which [the substance was] disposed of" (past owners and operators); (3) persons who arranged for disposal, treatment, or transport for disposal or treatment, of hazardous substances (arrangers); and (4) persons who transported hazardous substances for disposal at sites selected by such persons (transporters).[28] Responsible parties from any category are also held jointly and severally liable for the costs of cleanup to the extent that they cannot prove divisibility of the harm done.[29]

CERCLA's imposition of strict liability, and the broad categories of parties who may bear the liability, justify the wariness among prospective buyers to purchase and redevelop properties suspected of contamination. Once a person purchases such a property, the purchaser clearly fits into the section 107(a)(1) category of responsible parties, a "current owner." After the government has identified the person as a potentially responsible party, the government need only prove that there was a release or threatened release of hazardous substances from a facility causing the incurrence of response costs in order to impose strict liability on that party.[30] A current owner of a facility where a release of a hazardous substance has occurred may not raise as a defense that the current owner is not, in fact, responsible for the actual release. However, a court may make such a consideration in the current owner's later contribution action against other responsible parties under section 113.[31]

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sources regulated through other statutes, releases of radioactive materials, and the normal application of fertilizer); *id*. § 9601(14) (providing certain oil and gas exclusions from "hazardous substance").

24. 99 F.3d 505 (2d Cir. 1996).

25. *Id*. at 514 (citing S. REP. NO. 96-848 at 13 (1980)).

26. CERCLA § 107, 42 U.S.C.A. § 9607(a).

27. *See id*.

28. *Id*.

29. United States v. Alcan Aluminum Corp., 990 F.2d 711, 722 (2d Cir. 1993).

30. *Id*. at 721.

31. *See* CERCLA § 113, 42 U.S.C.A. § 9613(f) (allowing a person to seek contribution from any other person who is liable or potentially liable under section 107(a)); *but see* Farmland Indus., Inc. v. Colo. & E. R.R. Co., 944 F. Supp. 1492, 1501 (D. Colo. 1996) (allocating eighty-five to ninety percent liability for response costs to a current owner deemed not to be responsible for the release).

Section 107(b) creates the three available defenses to CERCLA liability: "(1) an act of God; (2) an act of war;" and (3) an act or omission of an unrelated (non-employee and non-contractual partner) third party.[32] Under the third defense, the defendant must establish, by a preponderance of the evidence, that "he exercised due care with respect to the hazardous substance concerned . . . and . . . 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."[33] Courts consistently have construed these defenses narrowly to effectuate the statute's broad purposes.[34]

As a result, beyond concerns about current owner status and strict liability, a person contemplating the purchase of property known or suspected to be contaminated by a hazardous substance must further be mindful of the narrow scope of available defenses. Unfortunately, these considerations too often hamper the prospective purchaser's decision to make the purchase of property, with the result that the property remains blighted and abandoned.

To be sure, CERCLA has induced beneficial outcomes by prompting actions to clean up contaminated properties. However, an ironic and undesirable side effect of the liability provisions of the Act is the creation of brownfields. Rather than buy property that will almost surely necessitate the cleanup of contamination and the imposition of liability, potential purchasers tend to develop cleaner properties outside urban areas.[35] This undesirable effect contributes to a condition that has been designated "urban sprawl."[36] Congress has attempted to subdue the disincentive to purchase and develop brownfields, and the associated problem of urban sprawl, by enacting the Brownfields Act.[37] Specifically, Congress has provided the BFPP exemption.

II. THE BONA FIDE PROSPECTIVE PURCHASER EXEMPTION

Prior to the 2002 signing of the Brownfields Act, EPA had conceived policies in an effort to promote cleanup for the beneficial reuse and development of contaminated properties. In furtherance of these policies, EPA in 1995 initiated its formal Brownfields Program. The agency's "investment—nearly $700 million—in the Brownfields Program has leveraged $5.09 billion in brownfields cleanup and redevelopment funding from the private and public sectors, and [has]

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32. CERCLA § 107(b), 42 U.S.C.A. § 9607(b).

33. *Id.* § 9607(b)(3).

34. *See, e.g.*, Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp., 964 F.2d 85 (2d Cir. 1992); Reichhold Chems., Inc. v. Textron, Inc., 888 F. Supp. 1116 (N.D. Fla. 1995); United States v. Shell Oil Co., 841 F. Supp. 962 (C.D. Cal. 1993).

35. REUSING LAND, *supra* note 1.

36. *See id*. Environmental Management Support, Inc. described "sprawl" as the push by developers into outlying areas. The result is the development of lands better resembling their natural state, absent the common environmental problems of urban areas, if they were left undeveloped.

37. *See supra* note 7 and accompanying text.

helped to create more than 24,920 new jobs for citizens in brownfields communities."[38] Moreover, before the implementation of its formal program, EPA established the practice of entering into contracts with prospective purchasers to encourage the development of properties.[39] These contracts, appropriately styled "prospective purchaser agreements," shielded certain purchasers from the liability that would otherwise be imposed for the cleanup of contamination on their properties.[40]

A. Immunity from Liability: From Prospective Purchaser Agreements to the BFPP Exemption

EPA's general policy has been that it will enter into an agreement, which will include a covenant not to sue, with a prospective purchaser if the person meets certain criteria.[41] The criteria reflect "EPA's commitment to removing the barriers imposed by potential CERCLA liability while ensuring protection of human health and the environment."[42] EPA further reserves the right to reject an offer from a prospective purchaser if it determines that entering into an agreement would not be in the public interest.[43] The creation of a prospective purchaser agreement requires the satisfaction of several conditions: (1) EPA action at the facility has been taken, is ongoing, or is anticipated to be undertaken; (2) EPA would receive a substantial benefit from the cleanup; (3) the continued operation or development of the facility would not aggravate or contribute to existing contamination nor interfere with a response action; (4) the continued operation or development of the property would not pose health risks to any person; and (5) the prospective purchaser must be financial viable.[44]

A BFPP under the Brownfields Act will gain similar immunity from cleanup as that achieved by a party to a prospective purchaser agreement. The Act has in effect enabled developers to enjoy the benefits of a prospective purchaser agreement without having to enter into a formal contractual relationship with EPA. Further, the BFPP protection should be applicable to a more expansive category of properties,[45] because absent from the definition of a BFPP in section 222 is any requirement that the property be subject to an EPA action.[46] In fact, the Act's definition of "brownfield site" specifically excludes "a facility that is

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38. REUSING LAND, *supra* note 1, at 5.

39. Announcement and Publication of Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (July 3, 1995).

40. *See id*.

41. *See id*. at 34,793.

42. *Id*.

43. *See id*.

44. *See id*. at 34,793-94.

45. Dale A. Guariglia et al., *The Small Business Liability and Brownfields Revitalization Act: Real Relief or Prolonged Pain?*, 32 ENVTL. L. REP. 10505 (2002).

46. *See* Brownfields Act § 222, 42 U.S.C.A. § 9601(40) (West Supp. 2004).

the subject of a planned or ongoing removal action."[47] For these reasons, it would appear that the new exemption provides an attractive alternative to the prospective purchaser agreement. However, before prospective purchasers trade in the opportunity to enter into a prospective purchaser agreement in favor of BFPP status, they should consider the requirements for achieving such status.

B. Requirements for Obtaining BFPP Status

The BFPP exemption is available under the Act to persons who acquire ownership of a facility after January 11, 2002 and whose CERCLA liability would be based solely on the person's ownership or operation of the facility.[48] Further, upon discovery of contamination at the facility, the exemption requires that the BFPP not impede the performance of a response action and satisfy eight criteria by a preponderance of the evidence.[49] Specifically, a BFPP must establish that: (1) all disposal of hazardous substances occurred before acquisition of the facility; (2) the person made all appropriate inquiries into the previous ownership and uses of the facility; (3) the person provided legally required notices with respect to the discovery or release of any hazardous substances at the facility; (4) the person exercised appropriate care with respect to hazardous substances found at the facility 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 hazardous substance; (5) the person provided full cooperation, assistance, and access to authorized persons conducting response actions; (6) the person complied with any applicable institutional controls; (7) the person complied with information requests; and (8) the person is not potentially liable, or affiliated with any person that is potentially liable, for response costs at the facility.[50]

Whether the availability of the BFPP exemption contributes to the promotion of the redevelopment and reuse of brownfields will likely depend upon the ease with which purchasers can establish these eight requirements. Criteria 3, 5, 6, 7, and 8 are not complicated.[51] In contrast, criteria 1, 2, and 4 are more confusing, necessitating EPA and judicial interpretation.

C. A Closer Look at Certain BFPP Criteria

Before the BFPP exemption operates with any certainty, prospective purchasers must evaluate how EPA and courts apply the first, second, and fourth requirements for obtaining it. The first criterion, that all disposal at the facility occurred before the person acquired it, is a familiar concept under CERCLA.[52]

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47. *Id.* § 9601(39)(B)(i).

48. *Id.* § 9607(r).

49. *Id.* § 9607(r).

50. *Id.* § 9601(40); Guariglia et al., *supra* note 45.

51. Guariglia et al., *supra* note 45 (referring to criteria 3, 5, 6, 7, and 8 for the BFPP exemption as "relatively straightforward").

52. *See* 42 U.S.C.A. § 9607(a)(2) (identifying as a potentially responsible party persons who

Prospective purchasers may expect that courts will use past treatment of the concept in their evaluation of this criterion. Standards for the "all appropriate inquiries" requirement, the second BFPP criterion, have not yet been established.[53] Until EPA fulfills its mandate by promulgating regulations, purchasers will have to act with respect to this requirement in accordance with the limited guidance provided by the statute.[54] Finally, treatment of the "appropriate care" requirement under section 222(a)(40)(D) of the Act, the fourth criterion for exemption, is also uncertain. Before the Act, at least one of the statutory defenses to CERCLA liability required that a person prove "due care" with respect to hazardous substances.[55] Purchasers will have to decipher past standards of due care for immediate guidance as to what will constitute appropriate care for the BFPP exemption. A closer look at these three potentially cumbersome criteria follows below.

1. Disposal of Criterion One: What Constitutes a Disposal?—Under CERCLA section 107(a)(2), a person who owned or operated a facility at the time of disposal of a hazardous substance is a potentially responsible party.[56] In several CERCLA liability cases, past owners or operators have tried to prove that disposal occurred either before or after their ownership or operation in attempts to absolve themselves. In assessing these arguments, courts have evaluated the activities in which past owners were engaged when they owned or operated the facility, as well as the nature of the contamination, to determine whether disposal occurred at that time.[57] The courts will likely use the same factors to determine whether disposal occurred during a BFPP's ownership or operation. Even if a person can prove that there was no addition of new hazardous substances during

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at the time of disposal of a hazardous substance owned or operated a facility at which the substance was disposed of; proof that disposal occurred at a time other than during a person's ownership or operation may release a person from this category of responsible parties).

53. See 42 U.S.C.A. § 9601(35)(B)(ii), requiring EPA to promulgate regulations establishing standards and practices for the purpose of satisfying "all appropriate inquires" by January 11, 2004. As of April 20, 2005, EPA had not yet issued its final ruling concerning the regulations. By that date, the agency had formed a "Negotiated Rulemaking Committee on All Appropriate Inquiry" for the purpose of drafting its final ruling. Also, on August 26, 2004, EPA proposed a rule announcing federal standards and practices for conducting all appropriate inquiries, as required under 42 U.S.C.A. § 9601(35)(B)(ii). The proposed rule may be found at 69 Fed. Reg. 52542. EPA is currently considering comments to its proposed rule. Descriptions of the events from meetings of the committee and the status of the proposed rule may be observed at http://www.epa.gov/swerosps/bf/regneg.htm.

54. *See id.* § 9601(35)(B)(iv)(II) (describing certain requirements for inclusion in EPA's future regulations).

55. *Id.* § 9607(b)(3) (requiring the exercise of due care with respect to hazardous substances for the raising of the third party defense).

56. *See* CERCLA § 107(a)(2), 42 U.S.C.A. § 9607(a)(2).

57. *See* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1572 (11th Cir. 1996) (inferring from the activities of the defendant and the existence of certain contamination that the disposal could not have occurred while the defendant owned and operated the facility).

the person's ownership of a facility, obtaining BFPP status will require proof that no disposal occurred with regard to preexisting contamination as well.

Such proof will depend upon the courts' interpretation of "disposal." CERCLA defines disposal as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any . . . hazardous waste into or on any land . . . so that such . . . waste . . . may enter the environment."[58] Courts have interpreted this definition to include the dispersal of contaminated soil during excavation, grading, and other activities.[59] A purchaser of brownfield property will have to be mindful of this treatment of the term "disposal," especially when the purchaser engages in digging, excavating, grading, and construction, activities inherent in the redevelopment of an abandoned property.

Until recently, courts have also generally agreed that disposal could occur not only from active human conduct, such as digging and excavating, but also as a result of the "passive migration" of contamination through a property's soil.[60] "Passive migration" is a term describing the reposing of preexisting waste and its subsequent movement through the soil and other parts of the environment.[61] Courts have traditionally cited the inclusion of the passive terms "spilling" and "leaking" in CERCLA's definition of disposal as justification for classifying passive migration as disposal.[62] For example, in *Nurad, Inc. v. William E. Hooper & Sons Co.*, the Fourth Circuit remarked that some of the words in the definition of disposal, including "deposit," "injection," "dumping," and "placing," appear to be primarily of an active voice.[63] Nevertheless, the court went on to comment that other words in the definition "readily admit to a passive component: hazardous waste may leak or spill without any active human participation."[64] However, in *United States v. 150 Acres of Land*, the Sixth Circuit reasoned that "because 'disposal' is defined primarily in terms of active words . . . the potentially passive words 'spilling' and 'leaking' should be interpreted actively."[65] Other circuits also limit "disposal" to spills occurring by human intervention.[66]

Prospective purchasers of brownfield properties will have to wait and see whether more circuits determine that passive migration is not a disposal under

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58. 42 U.S.C.A. § 9601(29) (West Supp. 2004); 42 U.S.C. § 6903(3) (2000).

59. *See, e.g.*, *Redwing*, 94 F.3d at 1494; Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338 (9th Cir. 1992); Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568 (5th Cir. 1988).

60. United States v. 150 Acres of Land, 204 F.3d 698, 705 (6th Cir. 2000); *see also* Michael S. Caplan, *Escaping CERCLA Liability: The Interim Owner Passive Migration Defense Gains Circuit Recognition*, 28 ENVTL. L. REP. 10121 (1998).

61. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 845 (4th Cir. 1992).

62. *Id*. at 846.

63. *Id*. at 845.

64. *Id*.

65. *150 Acres of Land*, 204 F.3d at 706.

66. *See, e.g.*, ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351 (2d Cir. 1997); United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996).

CERCLA. 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. Given the requirements for the exemption, in addition to proof that disposal occurred prior to ownership, a more narrow construction of "disposal" seems most appropriate. For example, the Act requires that the purchaser cooperate with the government by providing assistance and access to persons conducting response actions and complying with information requests.[67] This requirement implies that the purchaser and EPA would be engaged in a collaborative effort, each party having equal opportunity to detect and respond to leaking and spilling. Moreover, the Act provides that the person must exercise appropriate care with respect to hazardous substances by taking reasonable steps to stop any continuing release.[68] It would be unjust to deny a person BFPP status because passive migration beyond the control of a person taking reasonable steps occurred. Such a result seems appropriate for the traditional operation of CERCLA's provisions,[69] but it appears hostile to the purpose of the Brownfields Act, the promotion of brownfield redevelopment.

2. EPA Still Inquiring into What Will Satisfy Criterion Two: "All Appropriate Inquiries."—In addition to the requirement that the disposal of hazardous wastes occurred prior to the BFPP's ownership of a facility, section 222(a) of the Act requires that the BFPP make "all appropriate inquiries into the previous ownership and uses of the facility."[70] The Act required EPA, by January 11, 2004, to promulgate regulations establishing standards and practices for the purpose of satisfying this condition.[71] As of the writing of this Note, EPA had not yet issued its final ruling promulgating such regulations.[72] On August 26, 2004, EPA announced a proposed rule setting the standards and practices for all appropriate inquiries.[73] Until EPA promulgates its first rule, interim standards set forth in the Act will remain in effect.

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67. *See* 42 U.S.C.A. § 9601(40)(E) (West Supp. 2004); *supra* note 50 and accompanying text.

68. *See* 42 U.S.C.A. § 9601(40)(D); *supra* note 50 and accompanying text.

69. *See, e.g.*, Carson Harbor Village, Ltd. v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001) ("[The Court of Appeals] construe[s] CERCLA liberally to achieve these goals.") (quoting Kaiser Aluminum & Chem. Corp. v. Cattelus Dev. Corp., 976 F.2d 1338, 1340 (1992)); Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc., 240 F.3d 534, 546 (6th Cir. 2001) ("CERCLA is to be liberally construed to serve its dual purposes."); Commander Oil Corp. v. Barlo Equipment Corp., 215 F.3d 321, 327 (2d Cir. 2000) ("CERCLA must be construed liberally to effectuate its two primary goals.") (quoting BF. Goodrich v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992)); Atlantic Richfield Co. v. Am. Airlines, Inc., 98 F.3d 564, 570 (10th Cir. 1996) ("CERCLA . . . should be construed liberally to carry out its purpose.").

70. Brownfields Act § 222(a), 42 U.S.C.A. § 9601(40)(B)(i).

71. *Id.* § 9601(35)(B)(ii).

72. *See supra* note 53.

73. *See* Standards and Practices for All Appropriate Inquiries, 69 Fed. Reg. 52542 (proposed Aug. 26, 2004) (to be codified at 40 C.F.R. pt. 312).

Standards and practices that EPA must include in its regulation include: (1) results of an inquiry by an environmental professional; (2) interviews with past and present owners; (3) reviews of historical sources, such as title documents; (4) searches for recorded environmental cleanup liens against the facility; (5) reviews of government records concerning contamination at or near the facility; (6) visual inspection of the facility; (7) specialized knowledge of the purchaser; (8) relationship of the purchase price to the value of the property if it were not contaminated; (9) commonly known information about the property; and (10) the degree of obviousness of contamination and the ability to detect it by appropriate investigation.[74] Section 223(2)(B) of the Brownfields Act lists similar interim standards a BFPP must follow until EPA has promulgated its regulation.[75] The Act further provides that, for property purchased on or after May 31, 1997, the purchaser must follow the procedures of the American Society for Testing and Materials (ASTM),[76] including the document known as "Standard E1527-97," entitled "Standard Practice for Environmental Site Assessment: Phase I Environmental Site Assessment Process," to satisfy the requirement in the appropriate inquiries clause.[77]

The Act is silent regarding a purchaser's duty to do more to satisfy the "all appropriate inquiries" condition if the "Phase I" testing reveals contamination at the facility.[78] Presumably, because the Act requires the purchaser to exercise appropriate care with hazardous substances, such a Phase I revelation would require that the purchaser continue to test the property for contamination.[79] Nevertheless, until EPA comes out with its regulation, it will be left up to the potential BFPP to determine, with limited guidance from the interim standards, whether the degree of its inquiry complies with "generally accepted good commercial and customary standards and practices."[80]

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74. 42 U.S.C.A. § 9601(35)(B)(iii).

75. *See* Brownfields Act § 223(2)(B), 42 U.S.C.A. § 9601(35)(B)(iv)(I).

76. The ASTM procedures are regarded as the accepted industry standard for conducting Phase I environmental site assessments. Their purpose is to detect recognized environmental conditions. For a BFPP, these procedures would be followed in order to assess whether hazardous wastes exist on the property. Phase I would not include sampling and testing matter from the property.

77. 42 U.S.C.A. § 9601(35)(B)(iv)(II).

78. *See* Guariglia et al., *supra* note 45 (commenting that "if recognized environmental conditions are identified" during Phase I testing, a BFPP "may need to conduct Phase II investigation and sampling." A Phase I assessment is done for the limited purpose of identifying recognized environmental conditions. Phase II involves an evaluation of the condition in order to provide "sufficient information about the nature and extent of contamination").

79. *See id.*

80. *See* 42 U.S.C.A. § 9601(40)(B)(i) (providing that a BFPP make all appropriate inquiries into previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices).

3. What Standard of Care Under Criterion Four Is Appropriate for the Availability of the Exemption to Be an Incentive for Brownfield Redevelopment?—Under section 222(a) of the Brownfields Act, a person seeking the BFPP exemption must establish by a preponderance of the evidence that the person 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 (iii) prevent or limit human, environmental, or natural resource exposure to any previously released hazardous substance."[81] Prior to the Act's promulgation, section 107(b)(3) of CERCLA provided that an otherwise responsible party would not bear CERCLA liability if the person established, by a preponderance of the evidence, that the release and damages resulting therefrom "were caused solely by—an act or omission of a third party" and "that (a) he exercised due care with respect to the hazardous substance . . . in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party."[82] Both provisions contemplate assessment of how the person has handled hazardous substances upon their discovery at the facility. Although the courts generally construe defenses to CERCLA liability narrowly,[83] defendants have not shied away from raising the section 107(b)(3) third-party defense. Review of the courts' construction of the "due care" requirement may provide the best estimate of how a court may construe "appropriate care" under the BFPP provision in the future.

In *Idylwoods Associates v. Mader Capital, Inc.*,[84] property owners, upon discovering contamination, attempted to distance themselves from the property by ceasing to pay taxes on the site in the hope that county officials would foreclose on the property.[85] They also delayed providing a report to the county health department during a government agency's investigation.[86] The court concluded that a property owner demonstrates due care with respect to a particular hazardous waste by taking all precautions a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances.[87] The court noted that CERCLA liability may attach to the current owner of property on which there has been a response action, regardless of whether the current owner was actually responsible for the release of hazardous wastes, unless the owner can prove one of the section 107(b) affirmative defenses.[88] The defendant in *Idylwoods Association* could not successfully assert the section 107(b)(3) third party defense because of its failure to exercise due care

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81. Brownfields Act § 222(a), 42 U.S.C.A.§ 9601(40)(D).
82. CERCLA § 107(b)(3), 42 U.S.C.A. § 9607(b)(3).
83. *See supra* note 34 and accompanying text.
84. 956 F. Supp. 410 (W.D.N.Y. 1997).
85. *Id.* at 419.
86. *Id.*
87. *Id*. at 417.
88. *Id*. at 420.

with respect to the hazardous wastes.[89]

In *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*,[90] the defendants purchased land previously used to manufacture wood products using a process that involved treating the wood with creosote and other wood preservatives.[91] Significant amounts of preservatives remained on the site after the plant had ceased operations. In response to the State of Illinois's complaint, the defendants raised the third party defense successfully at the trial level.[92] The Seventh Circuit reversed, holding that the defendants were not entitled to the defense.[93] The court reasoned that the defendants were aware of the preservatives on the site and had not made any attempt to take positive steps to reduce the threat the creosote posed.[94] The court added that the defendants had a "responsibility to take affirmative measures to control the pollution on the site."[95]

The defendant in *State of New York v. Lashins Arcade Co.*[96] successfully raised the third party defense. In this case, after the defendant had received notice of a formal investigation into groundwater contamination on his property, he maintained a water filter, took water samples to be analyzed at a laboratory, instructed all of his tenants to avoid discharging any hazardous substances into the waste and septic systems, and conducted periodic inspections of the tenants' premises to ensure compliance with his instruction. The court affirmed summary judgment for the defendant, holding that he satisfied his obligation to exercise due care.[97] The *Lashins* defendant appears to have gone to great lengths to exercise due care, especially when compared to the defendants in *United States v. 150 Acres of Land*.[98] There, the defendant who raised a genuine issue regarding due care by doing nothing more than asking government authorities, after they inspected the defendants' property, to "advise them if anything needed to be done."[99] In the meantime, more than 550 drums containing ignitable waste sat unsupervised across the defendants' property.[100]

The cases demonstrate that the inquiry into whether a defendant exercised due care is very fact-specific. The evidence necessary to prove the exercise of due care will vary among the courts. The uncertainty regarding the sufficiency of the facts necessary to establish "due care in light of all relevant facts and circumstances," coupled with the fact that courts generally construe section

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89. *Id.*
90. 14 F.3d 321 (7th Cir. 1994).
91. *Id.* at 324.
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 325.
96. 91 F.3d 353 (2d Cir. 1996).
97. *Id.* at 362.
98. 204 F.3d 698 (2000).
99. *Id.* at 706.
100. *Id.* at 702.

107(b) defenses narrowly,[101] creates a potentially uneasy situation for defendants. Additionally, courts consistently construe the term "release" broadly,[102] and they reliably hold that excavating and filling contaminated land will constitute a release.[103]

Courts' construction of the "due care" requirement in the context of the third party defense affords some guidance to prospective purchasers pursuing the BFPP exemption. Assuming that the courts will synchronize their constructions of "appropriate care" and "due care," the determination whether a purchaser exercised appropriate care will involve a fact-specific inquiry that could vary from case to case. Uncertainty would result regarding fulfillment of the appropriate care requirement. If courts use the painstaking steps followed by the defendant in *Lashins* as the bar a BFPP must meet, the availability of the exemption loses some of its strength in effectuating the Act's purpose.

If courts construe the "appropriate care to take reasonable steps" requirement as EPA recently suggested,[104] a purchaser may in fact be required, at the very least, to meet the *Lashins* standard. In a March 2003 memorandum, EPA Office of Site Remediation Enforcement indicated that because a BFPP has knowledge of the likely existence of contamination prior to purchase and thus has an opportunity to plan, the BFPP should have to take "greater 'reasonable steps'" than an innocent landowner under section 107(b)(3).[105] Unfortunately, this guidance from EPA does not seem to be consistent with the purpose of the Act. If the Act requires a BFPP to take "greater reasonable steps" than a person asserting the third party defense, which was already limited in scope, it does not follow that the creation of the exemption would encourage brownfield redevelopment.

EPA might need to reconsider its plan for interpreting "appropriate care" if a heightened standard indeed discourages prospective purchasers from buying brownfields. As part of that consideration, EPA should look to the other

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101. *See supra* note 34 and accompanying text.

102. *See, e.g.*, United States v. CDMG Realty Co., 96 F.3d 706, 715 (3d Cir. 1996) (holding that under CERCLA, "release" is broader than "dispose," because it includes "leaching," which is commonly used to describe migration of contaminants in landfills).

103. *See, e.g.*, K.C. 1986 Ltd. P'ship v. Reade Mfg., 33 F. Supp.2d 820, 832-33 (W.D. Mo. 1998) (holding that construction of wells increased the rate of contaminant migration and raised a genuine issue whether it caused a release); Acme Printing Ink Co. v. Menard, Inc., 870 F. Supp. 1465, 1480 (E.D. Wis. 1994) (determining that excavation by current owner caused barrels of hazardous waste to rupture and, thus, owner's role in the release of hazardous substances precluded assertion of innocent landowner defense).

104. Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, EPA, to Director, Office of Site Remediation and Restoration, Region I et al., at 13 (Mar. 6, 2003) (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 ("Common Elements")), *available at* http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf.

105. *Id.*

requirements of a BFPP.[106] In particular, EPA should consider the cooperative effort between the BFPP and EPA that the other criteria mandate.[107] The defendant asserting the section 107(b) third party defense must prove that it exercised due care with respect to hazardous substances during a time preceding any EPA involvement. On the other hand, a BFPP must prove that it exercised appropriate care while it provided full cooperation, assistance, and access to authorized federal and state officials who are conducting response actions.

Additionally, courts have based their determination whether a party exercised due care for the third party defense on whether the party alerted authorities to the presence of hazardous substances, cooperated with authorities in their clean-up efforts, and complied with information requests.[108] The bases of these courts' determination of due care now encompass several conditions a BFPP must establish, including the exercise of appropriate care.[109] This demonstrates how the eight conditions must interact. Thus, a heightened standard for appropriate care might translate into raised thresholds for satisfaction of the other BFPP criteria. Judicial scrutiny will determine whether such a result rests in harmony with Congress's intent in promulgating the Act.

In determining the standards for the requirements for the BFPP exemption, EPA and the courts must be mindful of the Brownfields Act's purpose of promoting the purchase, redevelopment, and reuse of brownfields. If uncertainty about the requirements, and the effort required to satisfy them, causes pursuit of the exemption to become an unattractive alternative to developing non-brownfield properties, EPA and courts will have to adjust their standards in order to carry out the Act's purpose. Congress's intent was to award the exemption to an innocent and cooperative party. Congress also intended to create an exemption that would provide an incentive for brownfield redevelopment. To provide this incentive, the level of innocence and cooperation required for the exemption must be an achievable bar.

III. THE WINDFALL LIEN

Once a person successfully satisfies the potentially onerous requirements for the BFPP exemption, the person's focus must turn to another provision in the Act. Section 222(b) authorizes the government to obtain a lien on the property if it is unable to recover all of its costs related to the cleanup.[110] Consequently, in spite

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106. *See supra* note 50 and accompanying text.

107. *See supra* notes 67-69 and accompanying text.

108. *See, e.g.*, *Lashins*, 91 F.3d 353; *Idylwoods*, 956 F. Supp. 410; *supra* notes 82-87, 94-95 and accompanying text.

109. *See* 42 U.S.C.A. § 9601(40) (West Supp. 2004). The requirements that a BFPP provide notices with respect to the discovery of hazardous substances, provide full cooperation, assistance, and access, and comply with information requests are all separate criteria for the exemption. Courts have used similar criteria as factors for the determination of the use of due care for purposes of the third party defense.

110. *See* Brownfields Act § 222(b), 42 U.S.C.A. § 9607(r)(2).

of the careful work conducted by a BFPP in pursuit of such status, the BFPP might encounter a limitation on the exemption. Section 222(b) of the Brownfields Act states:

> If there are unrecovered response costs incurred by the United States at a facility for which an owner of the facility is not liable by reason of [the BFPP exemption], and if each of the conditions described in paragraph (3) is met, the United States shall have a lien on the facility.[111]

Paragraph (3) of this section lists the conditions to which the attachment of the lien is subject, requiring: (1) that a response action for which there are unrecovered costs to the United States be undertaken at the facility; and (2) that the response action increases the fair market value of the facility above that existing before the United States initiated the response action.[112] The lien would arise at the time at which the government first incurred costs with respect to a response action at the facility, and it would be for an amount equal to the lesser of the increase in fair market value or the unrecovered costs.[113] Therefore, although the statute defines a BFPP as a person who is not liable under CERCLA,[114] a BFPP may become liable nonetheless by virtue of the windfall lien.

By creating the windfall lien, Congress appears to have supplied the government with a safety net for the event that it would not be able to recover all of the costs of a particular response action. Remarkably, a party exempt from liability becomes that safety net, absorbing the unrecovered costs by operation of the lien. The attachment of the windfall lien could actually negate the BFPP exemption from CERCLA liability. The lien could even put a purchaser in a worse position than the purchaser would have been without the exemption.[115] Moreover, the presence of the safety net may provide EPA with little incentive to aggressively pursue potentially responsible parties. An examination of these practical considerations surrounding the windfall lien provision follows a discussion of whether the operation of the provision could violate the due process clause of the Fifth Amendment.

A. Due Process Challenge to the Windfall Lien

The terms of the windfall lien provision immediately raise questions concerning its operation. First, section 222 excludes provisions for pre-

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111. *Id.*

112. *See id.* § 9607(r)(3).

113. *See id.* § 9607(r)(4).

114. *See id.* § 9607(r)(1).

115. As discussed in Part II.A, *supra*, EPA's practice prior to the Brownfield Act was to enter into a prospective purchaser agreement with the purchaser. The agreement would include a covenant not to sue, which would protect the purchaser from future liability similar to that imposed by the windfall lien. In Part III.C, *infra*, the ordinary liability of a current owner under CERCLA is compared to that of a BFPP.

attachment notice and hearing. The section refers to CERCLA section 107(*l*)(3), which mandates that the government provide notice to all parties by filing its lien in the appropriate state office.[116] However, nothing in the statute entitles a person whose property is subject to a lien to any further notice or a hearing. Whether the absence of such language arises to a violation of the property owner's constitutional right to due process may be left to judicial interpretation.[117]

The windfall lien provision also raises questions about how to determine a property's value both before and after the cleanup. A reasonable method for measuring the value of the property will be necessary to determine the increase in the property's value as a result of the cleanup, because the increase in the property's value governs the amount of the lien.[118] Moreover, the duration of the lien is ambiguous. Section 222 provides that the lien shall continue until "the earlier of the satisfaction of the lien by sale or other means; or . . . recovery of all response costs incurred at the facility."[119] The ambiguity lies in the potential duration of the lien if EPA has to litigate with other potentially responsible parties. Each of these ambiguities provides enough uncertainty surrounding the potential deprivation of a BFPP's property rights to cause concern for whether the lien provision is in accord with the Fifth Amendment.

Nearly all of CERCLA's significant provisions have been subject to constitutional challenges.[120] In general, the statute has been equal to the task. Courts have consistently held that CERCLA's liability scheme conforms to constitutional requirements.[121] However, only the First Circuit, in *Reardon v. United States*,[122] has had the opportunity to rule on the constitutionality of the imposition of a lien under CERCLA. That case involved the section 107(*l*) lien provision, which existed in the statute prior to the 2002 amendments.[123]

Section 107(*l*) of CERCLA provides that the costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States.[124] The section further provides that the lien shall be upon "all real property and rights to such property which—(A) belong to such

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116. *See* CERCLA § 107(*l*)(3), 42 U.S.C.A. § 9607(*l*)(3).

117. *See* U.S. CONST. amend. V (stating "no person shall be . . . deprived of life, liberty, or property without due process of law").

118. *See* 42 U.S.C.A. § 9607(r)(3)(B).

119. Brownfields Act § 222, 42 U.S.C.A. § 9607 (r)(4)(D).

120. *See, e.g.*, Wagner Seed Co. v. Daggett, 800 F.2d 310, 317 (2d Cir. 1986) (holding that CERCLA's authorization of EPA to order cleanup of a waste spill, as well as treble damages, did not constitute a taking of property in violation of the due process clause); Continental Title Co. v. Peoples Gas Light & Coke Co., 959 F. Supp. 893, 901 (N.D. Ill. 1997) (finding that the CERCLA response cost recovery provision's unlimited degree of retroactivity does not violate due process); United States v. Shell Oil Co., 841 F. Supp. 962, 974 (C.D. Cal. 1993) (concluding that imposition of liability under CERCLA does not constitute a taking).

121. *See* cases cited *supra* note 120.

122. 947 F.2d 1509 (1st Cir. 1991).

123. CERCLA § 107(*l*)(1), 42 U.S.C.A. § 9607(*l*)(1).

124. *See id.*

person; and (B) are subject to or affected by a removal or remedial action."[125] Similar to the lien provision in the Brownfields Act, a lien under section 107(*l*) arises at the time the United States first incurs costs with respect to a response action, and the lien continues until the United States has collected reimbursement for the costs.[126]

In *Reardon*, the First Circuit held that imposing a lien without notice or an opportunity for a pre-deprivation hearing violated the Due Process Clause of the Fifth Amendment.[127] About four years after EPA notified the property owners in *Reardon* that they might be liable for the costs of a CERCLA response action, the agency, without further notice to the owners, filed a lien against their property under section 107(*l*). The owners filed a declaratory relief action seeking to remove the lien. They argued that the lack of notice and an opportunity for a hearing prior to the lien's attachment deprived them of due process. After a lengthy analysis, the court agreed.[128]

The First Circuit began its analysis by determining whether a federal court, under CERCLA, had jurisdiction to hear the complaint. Federal courts do not have jurisdiction to hear challenges to removal or remedial actions before their conclusion.[129] The purpose of that CERCLA provision is to prevent forestalling response actions that may be important to human health and to the environment.[130] However, the court determined that hearing the landowners' challenge did not present that type of hazard.[131] In fact, the court concluded that the due process complaint was not a challenge to a particular removal or remedial action at all. Rather, it was an objection to CERCLA itself and the court had jurisdiction in spite of the prohibitive provision.[132]

The *Reardon* court then turned to the substantive challenge to the CERCLA lien. In order to determine whether the enforcement of the lien violated the landowners' right to due process, the court employed a two-part analysis announced by the United States Supreme Court in *Connecticut v. Doehr*.[133] At issue in that case was a Connecticut statute authorizing a judge to allow the prejudgment attachment of real estate, without prior notice or hearing, upon the plaintiff's verification that there was probable cause to sustain the validity of the plaintiff's claim.[134] The plaintiff in *Doehr* applied to a state court for such a lien on the defendant's home in connection with an assault and battery claim he was seeking to institute against the defendant. The defendant did not learn of the attachment until after he received notice of his right to a post-attachment hearing.

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125. *Id.*
126. *See id.*
127. *Reardon*, 947 F.2d at 1523-24.
128. *Id.*
129. 42 U.S.C. § 9613(h) (2000).
130. *Reardon*, 947 F.2d at 1514.
131. *Id.*
132. *Id.*
133. 501 U.S. 1 (1991).
134. *Id.* at 4-5.

Rather than pursuing the hearing, the defendant filed suit in federal court claiming that the statute violated the Fifth Amendment Due Process Clause. The court of appeals eventually concluded that the statute did not satisfy due process requirements, and the Supreme Court affirmed.[135]

The analysis that *Doehr* followed asked two questions: (1) did the taking of a significant property interest occur; and (2) if so, what process is due under the circumstances?[136] The Supreme Court concluded that the property interests that the lien attachment effects are significant.[137] For a property owner, "attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default."[138] The Court added that the impairments to property rights that attachments and liens entail are "sufficient to merit due process protection."[139] Accordingly, the Court answered the question in step one of the analysis, whether a taking of a significant property interest occurred, in the affirmative.[140]

For step two of the analysis, a determination of what process was due under the circumstances, the Court turned to a test first introduced in *Mathews v. Eldridge*.[141] In *Mathews*, the Supreme Court balanced three factors: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[142] In *Reardon*, the court admitted that the effects of the lien on the private interests of the property owner were not as great as a total deprivation of household goods or wages.[143] However, the court pointed out that the statute contemplates the filing of a notice of lien well in advance of the completion of cleanup procedures, with the result that the lien would be for an indefinite amount.[144] This would increase the lien's effect on the landowners' property interest, because other parties could not identify any limit on the government's interest in the property.[145]

In addition to the considerable effect on private interests imposed by the CERCLA lien, the *Reardon* court identified a high risk of erroneous deprivation associated with the lien.[146] The court found no appreciable safeguards against the

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135. *Id*. at 18.
136. *Id*. at 10-12.
137. *Id*. at 11.
138. *Id.*
139. *Id.*
140. *Id*.
141. 424 U.S. 319 (1976).
142. *Id*. at 335.
143. *Reardon*, 947 F.2d at 1518.
144. *Id*. at 1519.
145. *Id*.
146. *Id*. at 1519-20.

erroneous deprivation: "CERCLA provides no such safeguards. It provides for no pre-deprivation proceedings . . . [n]or does CERCLA provide for an immediate post-deprivation hearing."[147] Finally, with regard to the third prong of the *Mathews* balancing test, the court failed to detect that the government had any present, recognized interest in the property that would warrant procedures that might otherwise be suspect under a due process analysis.[148]

The First Circuit, therefore, held in *Reardon* that "the deprivation caused by the CERCLA lien is significant," satisfying the first inquiry in the *Doehr* analysis.[149] Application of the *Mathews* test then revealed that the CERCLA lien procedures deprived the landowners of due process, because substantial private interests were at stake. The court held that the "lien statute completely lack[ed] procedural safeguards, [and] that the government [had] no pre-existing interest in the property."[150] The CERCLA lien provisions, "by not providing, at the very least, notice and a pre-deprivation hearing to a property owner [who has raised a colorable defense], violate[d] the fifth amendment due process clause."[151]

The *Reardon* holding departed from precedent that had been established by a myriad of constitutional challenges to CERCLA.[152] Some have commented that the divergence was necessitated by "the unique nature of the interests affected by the lien and the lien's immediate and irreparable harm."[153] The circuit court's ruling is acceptable because "[m]ost fundamental to the due process analysis are the . . . findings that pre-enforcement review will not frustrate CERCLA's purpose and will prevent irreparable harm to the [property owner]."[154]

Congress has not responded to the ruling in *Reardon*, nor have other courts had the occasion to follow the First Circuit's lead. In *United States v. 150 Acres of Land*,[155] the Sixth Circuit held that the CERCLA lien did not violate a property owner's Fifth Amendment due process rights.[156] However, in that case, the government provided notice to the owner of its intent to perfect the lien, and the government gave the owner an opportunity for a hearing before EPA Regional Judicial Officer. The court, applying the *Doehr* analysis, concluded that these measures were adequate safeguards against erroneous deprivation.[157]

The First and Sixth Circuits reached different conclusions concerning the constitutionality of the CERLCA lien. However, the facts in the two cases differed in one important respect. In *Reardon*, the absence of notice and a

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147. *Id*. at 1519.

148. *Id*. at 1521.

149. *Id*. at 1523.

150. *Id*.

151. *Id*. at 1523-24.

152. *See generally* cases cited *supra* note 120.

153. Cheryl Kessler Clark, *Due Process and the Environmental Lien: The Need for Legislative Reform*, 20 B.C. ENVTL. AFF. L. REV. 203, 216 (1993).

154. *Id*. at 219.

155. 204 F.3d 698, 710 (6th Cir. 2000).

156. *Id.*

157. *Id*. at 711.

predeprivation hearing led the court to conclude that the lien provision violated the Fifth Amendment Due Process Clause.[158] In *150 Acres of Land*, on the other hand, notice and an opportunity for a hearing provided adequate safeguards against an erroneous deprivation of property interests.[159] In each case, the opportunity for notice and a predeprivation hearing was a determining factor in the due process inquiry.

The terms of the windfall lien in the Brownfields Act closely resemble those in section 107(*l*).[160] The two sections each announce that the lien attaches when the government has first incurred costs in a response action. Therefore, the windfall lien shares the indefiniteness in the value of the lien that troubled the First Circuit in its examination of the original CERCLA lien.[161] Most notably, neither provision provides for a pre-deprivation hearing, the existence of which was the determining factor for the two circuits addressing the due process issue.[162]

The two lien sections do differ in their respective triggers. Under section 107(*l*)(i) of CERCLA, liability for response costs activates the attachment of a lien against the person's property.[163] The windfall lien of the Brownfields Act, on the other hand, is not a product of a person's liability. The lien attaches to property belonging to a person who has obtained immunity from CERCLA liability, a BFPP. Section 222(b) of the Act, instead, initiates the government's lien when the cleanup results in unrecovered costs from other parties and the property's value increases.[164] Undeniably, if due process requires a pre-deprivation hearing for a party who is liable to the government, then the same should hold true for a person technically free of any liability.

Pre-deprivation hearings for CERCLA liens do not interfere with CERCLA's purposes.[165] In contrast, the absence of this key ingredient of due process in windfall lien situations would frustrate the purposes of the Brownfields Act. The specter of the windfall lien provision may in itself discourage the use of the BFPP exemption, let alone its application without adequate procedural safeguards.

B. Attachment of the Windfall Lien May Negate the BFPP Liability Exemption

Whether or not the lien provision passes constitutional muster, the uncertainty that accompanies it may remain a cause for concern among potential BFPPs.

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158. *Reardon*, 947 F.2d at 1523-24. *See supra* note 151 and accompanying text.

159. *150 Acres of Land*, 204 F.3d at 711. *See supra* note 157 and accompanying text.

160. See 42 U.S.C.A. § 9607(e)(3) (West Supp. 2004) and 42 U.S.C. § 9607(*l*) (2000) for descriptions of the original CERCLA lien provisions, and 42 U.S.C.A. § 9607(r) (West Supp. 2004) for the Brownfields Act's windfall lien provision.

161. *Reardon*, 947 F.2d at 1519. In *Reardon*, the court pointed to the fact that the lien attaches well in advance of the completion of a cleanup action. This, according to the court, aggravated the effect the lien had on the property owner's property rights.

162. *See Reardon*, 947 F.2d at 1519; *150 Acres of Land*, 209 F.3d at 710.

163. CERCLA § 107(*l*)(1), 42 U.S.C.A. § 9607(*l*)(1) (West Supp. 2004).

164. *See* Brownfields Act § 222(b), 42 U.S.C.A. § 9607(r)(3).

165. *See* Clark, *supra* note 153, at 219.

Doubts about the operation of the provision may discourage these persons from pursuing the exemption and the redevelopment of brownfields altogether. The BFPP exemption loses credence where a BFPP may nonetheless have to pay for a cleanup by satisfaction of the lien.

As the *Reardon* court pointed out, the negative impacts of a CERCLA lien are immense.[166] The court explained that a lien "clouds title; impairs the ability to sell or otherwise alienate property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default."[167] These consequences of a lien describe a BFPP's actual liability for a response action, despite the Brownfield Act's portrayal of a BFPP as a person unencumbered by CERCLA liability.[168]

A BFPP's actual CERCLA liability essentially disguises itself in several parts of the Act. For instance, a person must first satisfy cumbersome, and sometimes vague, criteria to obtain the status of a BFPP, a process accompanied by appreciable costs.[169] The "all appropriate inquiries" requirement in section 222(a) is an example; it requires a person to interview environmental professionals and past and present owners, review title documents, search for recorded environmental cleanup liens against the facility, review government records concerning contamination at or near the facility, and visually inspect the facility.[170] At the same time, the BFPP must take reasonable steps to control any contamination found at the facility.[171] Moreover, if the government elects to exercise its statutory right to attach a lien on the BFPP's property, the BFPP suffers the negative impacts associated with the cloud on the property's title. In such a case where the government has made that election, the BFPP would ultimately be liable for satisfaction of the value of the lien. Therefore, a BFPP's exemption from liability does not arrive free of costs.

The justification for the inclusion of the lien in the Act is that it avoids a windfall to the BFPP, while allowing the government to recoup its otherwise unrecovered response costs.[172] The government must have assurance that it can recover its costs if CERCLA's laudable purpose to protect the public health through the cleanup of hazardous wastes is to be realized. CERCLA's ambition has been to ensure that those parties responsible for contamination pay for the cleanup.[173] A BFPP, whose effort in disproving responsibility for contamination earns an exemption from liability, plainly cannot be a party from whom recovery of CERLCA costs would further the statute's purposes.

A BFPP's incurrence of liability for the costs consequential to a cleanup

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166. *Reardon*, 947 F.2d at 1518-19.

167. *Id.*

168. 42 U.S.C.A. § 9607(r)(1) ("A [BFPP] . . . shall not be liable.").

169. *See* 42 U.S.C. A. § 9601(40). *See* discussion *supra* Part II (describing in detail the efforts required for satisfaction of the BFPP).

170. *See* 42 U.S.C.A. § 9601(40)(B).

171. *See id.* § 9601(40)(D).

172. *Id.* § 9607(r)(2).

173. BF Goodrich v. Betkoski, 99 F.3d 505, 515 (2d Cir. 1996).

action, cloaked in the attachment of a windfall lien, does not advance CERCLA's objective to recover costs from responsible parties. In addition, the potential liability on the part of a BFPP could thwart the aim of the Brownfields Act itself. An unattractive exemption is not likely to promote brownfield redevelopment, and thus, the price of the exemption may outweigh its benefits.

C. Equitable Considerations Point Away from the Imposition of the Windfall Lien

The test whether the consequences of the BFPP exemption are more destructive than beneficial is further demonstrated by a comparison of the BFPP, whose property is encumbered by the windfall lien, and an ordinary property owner found liable to the government in a cost recovery action. As discussed, the BFPP incurs great costs in obtaining the exemption. The BFPP suffers additional costs from the effects of the lien on the property and from the satisfaction of the lien by payment to the government for its value. The nonexempt property owner, on the other hand, is liable to the government for the sum of the judgment, which can include the government's entire cleanup costs, a figure that often reaches several million dollars.

However, under section 113(f)(1) of CERCLA, the nonexempt property owner may seek contribution from other potentially responsible parties.[174] That section proclaims, "any person may seek contribution from any other person who is liable or potentially liable under [section 107(a)], during or following any civil action under [section 106] or under [section 107(a)]."[175] Section 113(f)(1) requires that the plaintiff in a contribution action prove that the person from whom contribution is sought is liable under section 107(a).[176] In order to make such proof, the plaintiff must establish: (1) that the defendant falls within one of the four categories of potentially responsible parties; (2) that the site is a "facility," as defined by CERCLA; (3) that there has been a release of threatened release at the facility; and (4) that the plaintiff incurred necessary response costs.[177] Element number four appears to bar a BFPP from filing a claim for contribution from potentially responsible parties for the value of a windfall lien, because the BFPP, by definition, is exempt from liability for response costs.[178] This is an unfortunate consequence to a BFPP. The contribution action confers

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174. CERCLA § 113(f)(1), 42 U.S.C.A. § 9613(f)(1).

175. *Id*.

176. *See id*.

177. *See id*. § 9607(a).

178. The fourth element a plaintiff in a contribution action must prove to satisfy section 107(a), which is necessary to satisfy the elements of section 113(f), is that the plaintiff incurred necessary response costs. 42 U.S.C.A. § 9607(a). A BFPP has obtained an exemption from liability for response costs. 42 U.S.C.A. § 9607(r)(1). It follows that the BFPP would be barred from a claim for contribution for not having "incurred necessary response costs." A court would have to characterize the imposition of a windfall lien as the incurrence of response costs for a BFPP to sidestep this prohibition against its right to contribution.

on a nonexempt property owner a handsome opportunity to reduce its liability.

With regard to a claim for contribution by a liable party, section 113(f)(1) provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate."[179] Courts often employ the "Gore factors" to determine an appropriate allocation of costs.[180] Courts, in their own discretion, often consider several of the factors, a few, or even only one, depending upon the totality of the circumstances.[181] The Gore factors include:

> (1) the ability of the parties to demonstrate that their contribution to a discharge, release, or disposal of hazardous waste can be distinguished; (2) the amount of hazardous waste involved; (3) the degree of toxicity of the hazardous waste; (4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with Federal, State, or local officials to prevent harm to the public health or the environment.[182]

When the Gore factors work in an otherwise liable party's favor, courts often allocate little or even no liability to the party.[183] If a BFPP were allowed to seek contribution from other parties, it would stand to reason that consideration of the Gore factors would favor the BFPP. For example, for a person to qualify as a BFPP, all disposal of hazardous waste must have occurred prior to the person's acquisition of the property.[184] Therefore, Gore factor four would benefit the BFPP, because the person would not have been involved in the generation, transportation, treatment, storage, or disposal of hazardous wastes. Furthermore, factor five compels a consideration of the degree of care a person exercised with respect to the hazardous wastes. Certainly a BFPP's efforts in exercising appropriate care would demonstrate that the BFPP seized the spirit of this equitable factor as well.[185] And, finally, a BFPP must behave with unlimited cooperation with respect to government officials involved in a response action.

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179. CERCLA § 113(f)(1), 42 U.S.C.A. § 9613(f)(1).

180. Envtl. Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508 (7th Cir. 1992).

181. *Id*.

182. Alliedsignal, Inc. v. Amcast Int'l Corp., 177 F. Supp. 2d 713, 746-47 (S.D. Ohio 2001).

183. *See, e.g.*, Farmland Indus., Inc. v. Colo. & E. R.R. Co., 944 F. Supp. 1492, 1501 (D. Col. 1996) (allocating eighty-five to ninety percent of costs); Alcan-Toyo Am., Inc. v. N. Ill. Gas Co., 881 F. Supp. 342, 347 (N.D. Ill. 1995) (requiring site owner to bear ten percent of response costs). See also cases where no share of response costs were allocated to certain parties, including *Gopher Oil Co. v. Union Oil Co. of California*, 955 F.2d 519 (8th Cir. 1992); *City of Toledo v. Beazer Materials & Services, Inc.*, 923 F. Supp. 1013 (N.D. Ohio 1996).

184. 42 U.S.C.A. § 9601(40)(A) (West Supp. 2004).

185. *See id*. § 9601(40)(D) (requiring that a BFPP exercise appropriate care with respect to hazardous substances).

Therefore, Gore factor number six, too, would work to the BFPP's advantage.

Attachment of a windfall lien to a BFPP's property would potentially cause the person to incur a greater liability than the person would have had without the exemption. Congress did not have this result in mind when it created the exemption. The Gore factor analysis reveals that Congress had a relatively innocent party in mind for the BFPP exemption. However, the inclusion of the windfall lien may more than offset the reward of exemption for such innocence.

D. Additional Liability from EPA Use of the Safety Net

In recognition of the fact that the opportunity to seek contribution from other parties may not be available to a BFPP, prospective purchasers may wish to shun pursuit of the exemption altogether. Even if a BFPP were allowed to seek contribution in a section 113(f) action, the provision in section 113(f)(2) could work to the BFPP's detriment.[186] There, the statute says, "[a] person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."[187] Therefore, a party who has settled with EPA for its CERCLA liability may not be the subject of a contribution claim.

EPA has broad authority under CERCLA to enter into settlements with potentially responsible parties. Under section 122(a), EPA may enter into agreements with any potentially responsible party regarding cleanup responsibilities and liability.[188] Whenever EPA enters into an agreement with a party, the Attorney General is responsible for approving it, and the agreement is entered into the district court as a consent decree.[189] Before the court enters its final judgment, and after the proposed judgment is filed with the court, section 122(d)(2) requires the Attorney General to provide an opportunity to persons not named to the settlement to comment on the proposed judgment.[190] The Attorney General may then withhold consent to the proposed judgment if the comments disclose facts or considerations that indicate that the judgment would be inappropriate, improper, or inadequate.[191]

The United States Court of Appeals for the Third Circuit described in *In re Tutu Water Wells CERCLA Litigation* that "CERCLA favors fair and efficient settlements through consent decrees" by its section 122 provisions.[192] The court indicated that parties are not obligated to participate in settlement negotiations, but "non-settling defendants may bear disproportionate liability for their acts."[193]

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186. *See id.* § 9613(f)(2).

187. *Id.*

188. CERCLA § 122(a), 42 U.S.C.A. § 9622(a).

189. *See id.* § 9622(d)(1)(A).

190. *See id.* § 9622(d)(2).

191. *See id.* § 9622(d)(2)(B).

192. *In re* Tutu Water Wells CERCLA Litigation, 326 F.3d 201, 209 (3d Cir. 2003).

193. *Id.* at 208 (citing United States v. Occidental Chem., 200 F.3d 143, 150 n.8 (3d Cir.

Describing CERCLA's encouragement of efficient settlements, the court went on to say that "it makes sense for the government . . . to give a [potentially responsible party] a discount on its maximum potential liability as an incentive to settle . . . [T]hose who are slow to settle ought to bear the risk of paying more."[194]

Therefore, CERCLA encourages settlements, and lenient settlements with willing parties quick to the negotiation table are not disfavored under the statute nor by the courts. Additionally, nothing in the Brownfields Act discourages EPA from settling under CERCLA for low dollar amounts with other persons. The absence of any such provision in the Brownfields Act could bring about such an unfortunate circumstance, with EPA utilizing the windfall lien as a safety net for its unrecovered costs.[195] However, EPA's ability to settle with potentially responsible parties is not unchecked. A court will approve a consent decree if the settlement is "fair, reasonable, and consistent with CERCLA's goals."[196] A court's evaluation of the fairness of a consent decree involves an assessment of both procedural and substantive considerations.[197] The Third Circuit has said of those considerations:

> Procedural fairness requires that settlement negotiations take place at arm's length. A court should look to the negotiation process and attempt to gauge its candor, openness and bargaining balance. Substantive fairness requires that the terms of the consent decree are based on 'comparative fault' and apportion liability according to rational estimates of the harm each party has caused. As long as the measure of comparative fault on which the settlement terms are based is not arbitrary, capricious, and devoid of a rational basis, the district court should uphold it.[198]

The Third Circuit in *In re Tutu Water Wells* articulated an "arbitrary and capricious" standard for evaluating the fairness of an EPA-negotiated settlement.[199] Therefore, a court gives deference to the terms of a settlement agreement where EPA has been a party. In an earlier case, the First Circuit announced the same deferential standard when it stated, "where . . . a government actor committed to the protection of the public interest has pulled the laboring oar

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1999)).

194. *Id*. (citing United States v. SEPTA, 235 F.3d 817, 824-25 (3d Cir. 2000)).

195. The value of the windfall lien is limited to the lesser of the increase in the property's value as a result of the cleanup or the government's unrecovered costs. 42 U.S.C.A. § 9607(r)(4)(A) (West Supp. 2004). However, in a case where the increase in value is great, EPA could settle low with potentially responsible parties and yet recover its costs by operation of the windfall lien.

196. *Tutu Water Wells*, 326 F.3d at 207.

197. *Id*.

198. *Id*. (citations omitted).

199. *Id*.

in constructing the proposed settlement," there is a need for judicial deference.[200]

The encouragement for potentially responsible parties to settle their CERCLA liability with EPA, along with the agency's broad discretion in entering into settlements, makes it simple to contemplate a situation where EPA settles with potentially responsible parties and leaves a greater portion for the windfall lien on a BFPP's property. In effect, the settling parties, and not the BFPP, ends up with a windfall. This represents another result of the windfall lien provision that could undermine the purpose of the Brownfields Act. In order to effectuate the Act's purpose, courts will need to consider EPA's usage of the windfall lien safety net when evaluating settlement agreements under section 122.

CONCLUSION

The effect of CERCLA has been to clean up hazardous waste contamination and to cause those parties responsible for it to bear the costs. Necessarily, in order to accomplish its important purposes, the statute has been construed broadly, and defenses available to its liability provisions have been limited in scope. As a result, would-be purchasers, wary of the liability that could ensue from the purchase of potentially contaminated properties, have avoided these properties altogether. The unfortunate side effect has been the formation of brownfields.

Congress intended to suppress this effect by providing for a BFPP exemption from CERCLA liability in the Brownfields Act. The exemption is meant to promote the redevelopment of brownfields. However, the uncertainty surrounding its difficult requirements may make the exemption too unattractive for it to work in furtherance of the Act's purpose. If courts and EPA really wish to promote brownfield redevelopment, interpretation of the exemption's requirements must be made in favor of potential purchasers.

In particular, the requirement that all disposal at a facility occurred prior to a BFPP's ownership should be interpreted in such a way as to allow the BFPP to actually redevelop the property without worry that redevelopment activities may result in further disposal of preexistent disposed wasted. This would require some change in the way "disposal" has been interpreted in CERCLA cases. Because the BFPP requirements demand a cooperative effort between the property owner and EPA, the BFPP may deserve more lenient treatment. A BFPP must prove appropriate care with respect to hazardous substances while giving full cooperation to officials responding to a cleanup. Building and excavation activities on a property could disturb preexistent contamination despite such care and cooperation. If the disturbance were construed as a "disposal," spoiling the exemption, the exemption is sure to lose its effectiveness.

EPA must also issue its final ruling defining the standards and practices for the all-appropriate inquiries requirement for BFPP status in order to put potential purchasers on notice of the precise requirement. Further, EPA and courts cannot hold a BFPP to a heightened standard for appropriate care regarding hazardous

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200. United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990).

substances. To do so would not only undermine the Act's purpose, but it would ignore the overall tendency of the exemption's requirements to contemplate a cooperative effort between the purchaser and EPA. Successful assertion of the third-party defense to CERCLA liability has included the requirement that the property owner exercised due care with respect to hazardous substances. A showing of due care has required that the property owner alerted officials of contamination and took reasonable steps in light of previous ownership of the property. A BFPP must do the same while complying with specific information requests from officials and providing full cooperation, assistance, and access to authorized persons conducting response actions.

Even if strenuous requirements for the exemption do not discourage its widespread usage, and ultimately the realization of the Act's purpose, the existence of the windfall lien provision may have that effect. By attempting to avoid providing a windfall to BFPPs whose property increased in value as the result of government cleanup, Congress may have actually negated the BFPP liability exemption altogether. After *Reardon*, the lien provision may not be constitutionally stable because of its lack of provision for a pre-deprivation hearing. Constitutional due process issues notwithstanding, the provision may provide disincentive for brownfield redevelopment by causing an otherwise immune BFPP to incur CERCLA liability. Without the exemption, a liable property owner performing all of the steps necessary to gain that immunity would find favorable treatment when a court made its equitable considerations in a contribution action against other potentially liable parties. A BFPP may find itself in a worse position than it would have been without the exemption. This becomes more evident considering EPA's potential for settling low with responsible parties, recouping more costs from the BFPP. Unless Congress revisits the brownfields problem soon to address these issues with the BFPP exemption, courts and EPA will have to interpret and apply the Act in a way to promote its purpose. Otherwise, the brownfields problem may continue to become aggravated.