The *PCS Nitrogen* Case: A Chilling Effect on Prospective Contaminated Land Purchases

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THE PCS NITROGEN CASE: 
A CHILLING EFFECT ON PROSPECTIVE 
CONTAMINATED LAND PURCHASES 

KELLIE FISHER*

Abstract: The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) requires that all potentially responsible parties, including current and former land owners, contribute to the costs of cleanup of contaminated property. CERCLA includes a provision that grants bona fide prospective purchaser (BFPP) status and exemption from liability to land owners if liability under CERCLA is based solely on owning the land. In PCS Nitrogen v. Ashley II of Charleston, the U.S. Court of Appeals for the Fourth Circuit refused to grant BFPP status to Ashley II and suggested that a high standard of due care is required to obtain such status. This Comment argues that the court’s decision, and its suggestion that a high standard of due care is necessary to avoid liability, will make it more difficult for purchasers of contaminated land to avoid joint and several liability under CERCLA. The court’s decision will deter businesses from purchasing contaminated land with the intention of remediation and redevelopment.

INTRODUCTION

A large piece of contaminated land in Charleston, South Carolina sits on the bank of the Ashley River.¹ The EPA had designated the land as a Superfund site, businesses have come and gone, and the costs associated with cleaning up the land after years of degradation were estimated to be enormous.² Finally, a development company, ready to change the landscape of Charleston, assumed cleanup and redevelopment responsibility over the land.³ Yet this company, which attempted to follow the applicable regulations, is now facing large costs associated with investigating the contamination and remediating the site.⁴

Ashley II of Charleston, LLC (“Ashley”) is a business that hoped to utilize the Comprehensive Environmental Response, Compensation, and

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² See id. at 726; Brief for Appellee at 5, 7, PCS Nitrogen v. Ashley II of Charleston, 714 F.3d 161 (4th Cir. 2013) (No. 11-1662).
³ See PCS Nitrogen, 714 F.3d at 171.
⁴ See id.
Liability Act (CERCLA) and the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Act”) to clean and redevelop the piece of contaminated land along the bank of the Ashley River in Charleston, and to recover cleanup costs from the parties responsible for the contamination. The land, subjected to a century of degradation, was contaminated with lead, arsenic, and other dangerous materials, all hazardous to human health and the surrounding environment. Furthermore, the land along the Ashley River is critical to the revitalization of the Charleston metropolitan area. Ashley had a proven record of success in decontaminating land for a sustainable development, as it had already remediated twenty parcels of land for its Magnolia Development.

With the support of the City of Charleston, the EPA, and the South Carolina Department of Health and Environmental Control, Ashley began to remediate the site and expected to hold the previous owners of the land liable for cleanup costs under CERCLA. Ashley anticipated remaining exempt from liability because of the bona fide prospective purchaser exemption established in the Brownfields Act, but in PCS Nitrogen, Inc. v. Ashley II of Charleston, the U.S. Court of Appeals for the Fourth Circuit held Ashley liable for costs associated with cleanup with the other previous owners that contributed to contamination of the site. Money from investors, given with the intention of stimulating the economy in the area and encouraging cooperation with the EPA, now must go to cleanup costs, and as investment in the land has stopped and funds are no longer available, Ashley cannot proceed with the Magnolia Development project at the site.

This Comment argues that the court’s decision to deny Ashley bona fide prospective purchaser status, and the simultaneous decision to allocate liability to Ashley, will chill Brownfields redevelopment and ultimately hinder cleanup efforts. The Fourth Circuit’s decision was contrary to the purpose of the Brownfields Act, and the court should have found that Ashley exercised the appropriate standard of due care when remediating the site, and therefore should not be held liable for cost recovery.

5 See Ashley II of Charleston, 746 F. Supp. 2d. at 697, 699.
6 See PCS Nitrogen, 714 F.3d at 168.
7 Brief for Appellee, supra note 2, at 6. The City of Charleston has taken substantial steps to ensure that the site returns to productive use, including issuing tax increment financing bonds and municipal improvement bonds for the project. Ashley II of Charleston, 746 F. Supp. 2d. at 722.
8 Brief for Appellee, supra note 2, at 67.
9 See id.
10 See PCS Nitrogen, 714 F.3d at 171, 181.
11 See Brief for Appellee, supra note 2, at 6.
12 See id. at 67.
I. FACTS AND PROCEDURAL HISTORY

The forty-three acre parcel of contaminated land that borders the Ashley River in Charleston, South Carolina, has a long history of changing hands and subdivision.14 From 1884 to the early 1900s, seven phosphate fertilizer plants operated in close proximity to the site.15 In 1906, Planter’s Fertilizer & Phosphate Company (“Planter’s”) purchased the site and began to produce sulfuric acid and manufacture fertilizer.16 Planter’s used pyrite ore as the primary fuel for sulfuric acid production, which produced a slag containing high levels of arsenic and lead.17 The company spread the slag over the property to stabilize roads on the site.18 The pollutants in this slag are responsible for the majority of the arsenic and lead contamination on site today.19

In 1966, Planter’s sold the fertilizer plant to Columbia Nitrogen Corporation (“Old CNC”).20 The Old CNC continued to produce the acid and fertilizer until the early 1970s and contributed to soil contamination onsite.21 In 1985, Old CNC sold the property to James H. Holcombe and J. Henry Fair (collectively “Holcombe and Fair”), but did not transfer its corporate liabilities for past actions on the site, which effectively made Old CNC a potentially responsible party (“PRP”) for the site.22 Holcombe and Fair did not know about the contamination at the time of purchase and only discovered it in 1990.23 Old CNC was acquired by the Columbia Nitrogen Corporation, which, after a series of mergers and acquisitions, was eventually acquired by PCS Nitrogen.24

Holcombe and Fair subdivided and conveyed several parcels from the original site to Robin Hood Container Express (“RHCE”), the City of Charleston, and Allwaste Tank Cleaning, Inc.25 Although Holcombe and Fair, as well

14 See Brief for Appellee, supra note 2, at 5, 7.
15 PCS Nitrogen, 714 F.3d at 168–69.
16 Id. at 169.
17 Ashley II of Charleston, 746 F. Supp. 2d at 702. Burning the pyrite ore during production of sulfuric acid created contaminated slag as a byproduct. See PCS Nitrogen, 714 F.3d at 169.
18 PCS Nitrogen, 714 F.3d at 169.
19 Id.
20 Ashley II of Charleston, 746 F. Supp. 2d. at 704.
21 PCS Nitrogen, 714 F.3d at 169. Old CNC generated dust that contained elevated levels of arsenic and lead in its production of superphosphate fertilizer. It also conducted construction and demolition activities that affected almost eighty percent of the soil on the site. Id.
22 Id.
23 Id. at 170.
25 PCS Nitrogen, 714 F. 3d at 170, 171.
as the purchasers of the parcels, did not introduce arsenic or lead into the ground, the companies did own parcels of land when the action was commenced.\textsuperscript{26}

In 2003, Holcombe and Fair sold the remaining 27.62-acre parcel to Ashley for $2.7 million.\textsuperscript{27} Ashley knew of the contamination at the time of purchase, and intended to remediate the site under CERCLA as a part of its Magnolia Development project.\textsuperscript{28} To comply with CERCLA, Ashley hired an environmental engineer with more than thirty-five years of experience.\textsuperscript{29} Working with the EPA and the engineer, the parties agreed that the remediation would include soil removal action, groundwater treatment, and sediment action.\textsuperscript{30} The total cost of the work was expected to be approximately $8 million, and Ashley intended to recover the response costs under the CERCLA and the Brownfields Act.\textsuperscript{31} As of April 2013, Ashley had incurred at least $194,000 in response costs at the site.\textsuperscript{32}

To recover the response costs for the site remediation, Ashley filed an action against PCS Nitrogen in federal court on September 26, 2005, and contended that PCS Nitrogen was a successor corporation to Old CNC, and therefore was liable as a PRP.\textsuperscript{33} PCS denied liability and filed a contribution counterclaim under 42 U.S.C. § 9613(f) against Ashley, as well as the other parties who owned parcels of the original piece of land either in the past or present.\textsuperscript{34} These parties filed counter- and cross-claims against one another under § 9613(f) and sought determination of their rights to future cost recovery and contribution.\textsuperscript{35} The district court bifurcated the proceedings into liability and allocation phases, and a decision was rendered by the district court in October of 2010.\textsuperscript{36} In April 2013, the Fourth Circuit reviewed the district court’s decision.\textsuperscript{37} The Fourth Circuit affirmed that PCS Nitrogen was a corporate successor to Old CNC and was therefore jointly and severally liable for response costs at the site.\textsuperscript{38} The Fourth Circuit also allocated

\begin{itemize}
  \item \textsuperscript{26} See id.
  \item \textsuperscript{27} Id. at 171.
  \item \textsuperscript{28} See Brief for Appellee, supra note 2, at 5–6.
  \item \textsuperscript{29} See id. at 73.
  \item \textsuperscript{30} See id. at 19.
  \item \textsuperscript{31} Ashley II of Charleston, 746 F. Supp. 2d at 697, 726.
  \item \textsuperscript{32} PCS Nitrogen, 714 F.3d at 171.
  \item \textsuperscript{33} Complaint, supra note 24, at 31.
  \item \textsuperscript{34} PCS Nitrogen, 714 F.3d at 171.
  \item \textsuperscript{35} Id.
  \item \textsuperscript{36} Ashley II of Charleston, 746 F. Supp. 2d at 698.
  \item \textsuperscript{37} PCS Nitrogen, 714 F.3d at 167.
  \item \textsuperscript{38} Id. at 176.
\end{itemize}
liability to other PRPs named in the suit, including Holcombe and Fair, RHCE, and Ashley.  

Ashley bought the property with the intention of obtaining bona fide prospective purchaser (“BFPP”) status. The district court held that Ashley failed to establish a number of the eight criteria needed for BFPP status. This included a failure to exercise 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.”

The district court gave several examples of situations in which Ashley did not use appropriate care, and the Fourth Circuit affirmed. Ashley failed to remove a debris pile from the site, but the pile was tested and there was no contamination above EPA levels of established concern. Furthermore, the appropriate care standard applies only to hazardous substances, but the pile in question only contained trash and debris. The EPA and the South Carolina Department of Health and Environmental Control were aware of the pile and did not ask Ashley to take action.

The district court also held that Ashley failed to maintain a limestone run of crusher (ROC) cover on the site. The site had never been fully covered with a ROC cover, and when one part of the site was found to contain contaminated soil, the area was quickly covered with ROC. Finally, the district court found that Ashley failed to clean out concrete sumps. All waste testified that it cleaned the sumps, and the environmental engineer asserted that he did not see liquid in them. This testimony led the environmental engineer and Ashley to reasonably believe that the sumps did not pose an environmental hazard.

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39 See id. at 178, 179, 181. The court also held that the harm should not be apportioned, and it affirmed the allocation of liability. See id. at 183, 185.
40 See Brief for Appellee, supra note 2, at 73.
41 Ashley II of Charleston, 746 F. Supp. 2d at 752, 753. Ashley did not meet three of the required criteria: Ashley was found to have an improper affiliation with a PRP, did not exercise appropriate care at the site, and did not prove that disposal of hazardous substances did not occur during Ashley’s ownership. See id. at 750, 752, 753.
42 PCS Nitrogen, 714 F.3d at 180.
43 See id. at 181; Ashley II of Charleston, 746 F. Supp. 2d at 752.
44 Brief for Appellee, supra note 2, at 74–75.
45 Id. at 75.
46 Id.
47 Ashley II of Charleston, 746 F. Supp. 2d at 752. A limestone ROC layer is used to allow better drainage on a site. Id. at 699.
48 See Brief for Appellee, supra note 2, at 76.
49 PCS Nitrogen, 714 F.3d at 180.
50 Brief for Appellee, supra note 2, at 78.
51 See id.
The Fourth Circuit suggested that because the BFPP knew of the presence of hazardous waste at the facility, there should be a higher standard of due care required than that of an innocent landowner.\textsuperscript{52} While the Fourth Circuit did not decide if the BFPP standard of appropriate care at the facility was higher than the standard of due care mandated elsewhere in CERCLA, it did decide that Ashley, which knew about the presence of hazardous substances at the site, failed to take the steps required by a BFPP to establish appropriate care.\textsuperscript{53}

\section*{II. LEGAL BACKGROUND}

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in response to the serious environmental and health risks posed by industrial pollution.\textsuperscript{54} To establish liability for cost recovery of hazardous waste cleanup under CERCLA, a private party plaintiff must establish the following criteria: (1) the defendant is a potentially responsible party ("PRP"); (2) the site constitutes a "facility"; (3) a "release" or a threatened release of hazardous substances exists at the facility; (4) the plaintiff has incurred costs responding to the release or threatened release of hazardous substances ("response costs"); and (5) the response costs conform to the National Contingency Plan.\textsuperscript{55} Liability in CERCLA cases is joint and several if the harm is indivisible.\textsuperscript{56}

There are four, non-mutually exclusive classes of PRPs liable for costs incurred in responding to a release of hazardous substances at a facility, as defined by CERCLA.\textsuperscript{57} Two examples of PRPs include the current owner or operator of a facility and any person who owned or operated the facility at the time of disposal of a hazardous substance.\textsuperscript{58}

By 2002, CERCLA’s liability scheme began to have a chilling effect on redevelopment projects.\textsuperscript{59} Developers were concerned about bearing the response costs for cleanup under CERCLA and feared prolonged entanglements in litigation.\textsuperscript{60} To encourage remediation and redevelopment of sites

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\textsuperscript{52} PCS Nitrogen, 714 F.3d at 180.
\textsuperscript{53} See id. at 180, 181.
\textsuperscript{55} ABB Indus. Sys. v. Prime Tech., 120 F.3d 351, 356 (2nd Cir. 1997) (citing 42 U.S.C. § 9706(a) (2006)).
\textsuperscript{56} See United States v. Monsanto Co., 858 F.2d 160, 171 (4th Cir. 1988).
\textsuperscript{57} See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 841 (4th Cir. 1992) (citing 42 U.S.C. § 9706(a) (2006)).
\textsuperscript{58} See id. The two remaining classes of PRPs include any person who arranged for disposal or treatment of hazardous substances at the facility and any person who accepts hazardous substances for transport to disposal or treatment facilities, incineration vessels, or sites. See id.
\textsuperscript{59} See Brief for Appellee, supra note 2, at 65.
\textsuperscript{60} Id.; see S. REP. NO. 107-2, at 2–3 (2001).
\end{flushleft}
affected by hazardous waste, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Act”) in 2002. The purpose of the Brownfields Act was to relax the strict standards of CERCLA for developers to encourage the cleanup, remediation, and redevelopment of contaminated sites around the country. Lawmakers hoped that the Brownfields Act would alleviate the fears of developers and real estate interests and would lead to more cleanups. An important tool for encouraging redevelopment was 42 U.S.C. § 9607(r)(1); this section provided for a bona fide prospective purchaser (BFPP) exemption from liability if liability is based solely on being an owner of a facility. The BFPP will be exempt from liability if it does not impede the performance of the response action.

To qualify for BFPP exemption when the court is allocating liability, the current owner or operator of a facility must have acquired the facility after January 11, 2002, must not impede the performance of a response action or natural resource restoration at the facility, and must establish eight criteria by a preponderance of the evidence. One of the eight requirements necessary to prove BFPP exemption is that the owner must exercise 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. The reasonable steps required under the appropriate care standard establish an approach that is consistent with traditional common law principles and the existing CERCLA due care requirement.

The court has given little guidance on how to apply the appropriate care standard for BFPPs. In the 2010 case *3000 E. Imperial, LLC v. Robertshaw Controls, Co.*, the U.S. District Court for the Central District of California dismissed a counterclaim against the plaintiff because the plain-
tiff established a BFPP defense. The plaintiff cooperated with the California Department of Toxic Substances to coordinate a voluntary cleanup. After toxins were found in underground storage tanks, the plaintiff had liquid withdrawn from the tanks and stored in drums, but several months later an oily substance was found floating on top of that liquid. The tanks were excavated two years after finding the oily material, but the defendant alleged that the plaintiff should have excavated the underground storage tank soon after finding to prevent further release of toxic substances into the groundwater. The court held that the plaintiff took reasonable steps to stop any continuing leak or prevent future leaks by draining the tanks, and the defendant did not provide any evidence suggesting why the plaintiff would have had reason to believe that the underground storage tanks were not empty of hazardous material or should have excavated them sooner.

In the 1996 case State of New York v. Lashins Arcade Co., the U.S. Court of Appeals for the Second Circuit held that the defendant demonstrated that he took all precautions regarding waste that a similarly situated reasonable and prudent person would have taken considering the relevant facts and circumstances. The defendant purchased a contaminated property in New York. The seller told him that there were chemicals in the ground that were being treated, and in response, the defendant contacted the water service contractor and the town to ensure that there were no problems. At the time of closing, the defendant was unaware of the extent of the contamination and of the administrative proceedings against the site. The court held that the defendant was exempt from liability because he did not play a role in creating the hazardous waste problem, investigated the site, and exercised due care considering all the relevant facts and circumstances.

In the 1992 case Lincoln Properties, Ltd. v. Higgins, decided by the U.S. District Court for the Eastern District of California, the owner of a shopping center sued for contribution under CERCLA after chemicals were found to have leaked into a well and groundwater. Lincoln filed a suit against the County for contribution and alleged that the County owned part

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71 Id. at 11.
72 Id. at 12.
73 Id.
74 Id.
76 See id. at 357.
77 Id.
78 Id.
79 Id. at 360–61, 362.
of the sewer system and wells.\textsuperscript{81} The court granted summary judgment for the County and held that the County established a third party affirmative defense by demonstrating that it exercised enough due care.\textsuperscript{82} The County exercised due care regarding its wells and sewer systems by testing the wells for hazardous material, and when the County found problems, it carried out inspections and took the contaminated wells out of service.\textsuperscript{83}

In the 1994 case \textit{Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.}, the U.S. Court of Appeals for the Seventh Circuit found that the defendants did not use due care when they owned the site and were therefore liable.\textsuperscript{84} The defendants purchased the contaminated site from the plaintiff in 1972, and the plaintiff hoped to recover some expenses associated with cleanup.\textsuperscript{85} The defendants were liable as current owners because they did not use due care when they owned the site, and they did not take any action to remove or clean up the hazardous waste and did not take the necessary steps to prevent foreseeable, adverse consequences.\textsuperscript{86}

\textbf{III. ANALYSIS}

In \textit{PCS Nitrogen, Inc. v. Ashley II of Charleston}, the U.S. Court of Appeals for the Fourth Circuit affirmed the district court’s decision to allocate liability to PCS Nitrogen because it was a successor corporation to Columbia Nitrogen Corporation, which was a successor corporation to Columbia Nitrogen Corporation ("Old CNC").\textsuperscript{87} PCS Nitrogen assumed liability for the contamination caused by Old CNC, and PCS Nitrogen was found liable for remediation costs.\textsuperscript{88}

The Fourth Circuit held that Holcombe and Fair combined were a potentially responsible party ("PRP").\textsuperscript{89} Secondary disposals, or movement or disposal of already-once-disposed hazardous substances through earth moving or construction activities that occur during ownership of the site, occurred when Holcombe and Fair owned the property.\textsuperscript{90} Although there was no direct evidence to demonstrate this, the court did not require a “smoking

\begin{itemize}
\item[\textsuperscript{81}] See id.
\item[\textsuperscript{82}] See id. at 1544.
\item[\textsuperscript{83}] Id. at 1543–44.
\item[\textsuperscript{84}] Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 (7th Cir. 1994).
\item[\textsuperscript{85}] Id. at 324.
\item[\textsuperscript{86}] See id. at 325.
\item[\textsuperscript{87}] See PCS Nitrogen v. Ashley II of Charleston, 714 F.3d 161, 176 (4th Cir. 2013).
\item[\textsuperscript{88}] Id at 185.
\item[\textsuperscript{89}] See id. at 178.
\item[\textsuperscript{90}] Id. at 177 (quoting Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988)) ("[CERCLA’s] definition of disposal does not limit disposal to a one-time occurrence—there may be other disposals when hazardous materials are moved, dispersed, or released during landfill excavations and fillings.").
\end{itemize}
“gun” and held that liability may be inferred from the totality of circumstances.\textsuperscript{91} The Fourth Circuit also held that Robin Hood Container Express (“RHCE”) was a PRP because it was a current operator under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).\textsuperscript{92} The court also decided that the PRPs are subject to joint and several liability, rather than individual share apportionment.\textsuperscript{93}

The Fourth Circuit decided that Ashley II of Charleston, LLC (“Ashley”) was a PRP because Ashley was a current owner or operator of the site, and therefore, subject to joint and several liability.\textsuperscript{94} The court claimed not to determine whether the appropriate care standard for a bona fide prospective purchaser (“BFPP”) defense should be higher than the due care standard used elsewhere in CERCLA, but used the due care standard to determine whether Ashley exercised a level of appropriate care necessary to enact a BFPP defense.\textsuperscript{95} The court held that Ashley failed to fill in the waste sumps on the site, and therefore did not take all precautions regarding the particular waste that a similarly situated reasonable and prudent person would have taken considering all the relevant facts and circumstances.\textsuperscript{96}

The decision to deny Ashley BFPP status will chill cleanup and redevelopment efforts around the country.\textsuperscript{97} The Fourth Circuit should have given more weight to the legislative history of the Small Business Liability Relief and Brownfields Revitalization Act (“Brownfields Act”) and held that Ashley exercised the appropriate level of due care when cleaning the Charleston site.\textsuperscript{98} As the standard of care for a BFPP is a relatively novel issue, there is no case law that supports the proposition that Ashley should be held to a higher standard than the normal due care.\textsuperscript{99} In its decision in \textit{PCS Nitrogen}, the Fourth Circuit said logic seems to suggest that the standard of “appropriate care” required of a BFPP, who by definition knew of the presence of hazardous substances at a facility, should be higher than the standard of “due care” required of an innocent landowner, who by definition “did not know and had no reason to know” of the presence of hazardous substances when it acquired a facility.\textsuperscript{100} Although the Fourth Circuit did not decide whether a BFPP is held to a higher standard of care than an inno-

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\item[\textsuperscript{91}]See \textit{PCS Nitrogen}, 714 F.3d at 177 (citing Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 136 (2d Cir. 2010)).
\item[\textsuperscript{92}]See id. at 179.
\item[\textsuperscript{93}]See id. at 181.
\item[\textsuperscript{94}]See id. at 179.
\item[\textsuperscript{95}]See id. at 181.
\item[\textsuperscript{96}]See \textit{PCS Nitrogen}, 714 F.3d at 80.
\item[\textsuperscript{97}]See Brief for Appellee, \textit{supra} note 2, at 65; Warren & Finger, \textit{supra} note 69, at 10792.
\item[\textsuperscript{98}]See \textit{Pallone’s Statement}, \textit{supra} note 13; \textit{President Signs Brownfields Bill}, \textit{supra} note 13.
\item[\textsuperscript{99}]See \textit{PCS Nitrogen}, 714 F.3d at 180; Warren & Finger, \textit{supra} note 69, at 10790.
\item[\textsuperscript{100}]\textit{PCS Nitrogen}, 714 F.3d at 180.
\end{itemize}
cent purchaser, the suggestion that a higher level of due care is required is incorrect and inconsistent with previous cases. A better approach is to hold BFPPs to the same standard of due care as held in prior CERCLA cases, because the EPA has stated that reasonable steps required under the appropriate care standard establish an approach that is consistent with traditional common law principles and the existing CERCLA due care requirement.

The court in 3000 E. Imperial, LLC v. Robertshaw Controls Co. did not discuss a higher standard of due care to establish a BFPP defense and merely held that the plaintiff needed to take reasonable steps to prevent further release of hazardous substances. The suggestion that BFPPs should be subjected to a higher standard of due care than an innocent purchaser is contrary to this decision. Although a hazardous substance was found in the material extracted from the tanks in 3000 E. Imperial, the tanks were not excavated for two years, and the court held that the plaintiff had no reason to suspect that hazardous material at the site was still a threat. This is similar to the fact pattern in PCS Nitrogen, in which Ashley reasonably believed that the concrete sumps on the property were empty, and there was no indication that they contained hazardous material.

In a similar decision, the court in State of New York v. Lashins Arcade Co. considered the standard of due care. The defendant took all precautions regarding the particular waste that a similarly situated reasonable and prudent person would have taken considering all the relevant facts and circumstances, and took the necessary steps to protect the public from a health or environmental threat. Ashley also took all precautions considering the relevant circumstances and met the standard of due care established in Lashins. Ashley hired an environmental engineer with Superfund and BFPP experience to guide the cleanup process to ensure that Ashley would meet all environmental standards, and the EPA was onsite several times. All-waste, a previous owner, testified that it cleaned out the sumps and disposed of the waste, and the environmental engineer did not see any liquid in the

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101 See id. at 180; State of N.Y. v. Lashins Arcade Co., 91 F.3d 353, 361, 362 (2nd Cir. 1996).
102 See Brief for Appellee, supra note 2, at 74; EPA Interim Guidance, supra note 68, at 11.
104 See id. at *12; PCS Nitrogen, 714 F.3d at 180.
105 3000 E. Imperial, 2010 WL 5464296, at *12.
106 See Brief for Appellee, supra note 2, at 77–78.
107 See Lashins Arcade, 91 F.3d at 360–61.
108 See Brief for Appellee, supra note 2, at 77–78.
110 See Ashley II of Charleston, 746 F. Supp. 2d at 723; Brief for Appellee, supra note 2, at 75.
sumps, which led Ashley to reasonably believe that there was no present danger associated with the sumps onsite. Considering all relevant facts and circumstances, it is unlikely that a reasonable and prudent person would have discovered the contamination before Ashley cleaned the sumps. No heightened standard of care was necessary, as the EPA has stated that appropriate care should be approached in a manner consonant with the due care requirement and should be reasonable.

The U.S. District Court for the Eastern District of California found that the County in *Lincoln Properties, Ltd. v. Higgins* exercised due care and could be exempt from liability. The proactive steps taken by the County, including testing wells and taking a well out of service when it was found to be contaminated, constituted an appropriate level of due care. Ashley took similar proactive steps in its cleanup of the site, and therefore should have been found to have exercised an appropriate standard of due care. Ashley contacted the EPA at the beginning of the remediation process and asked whether and when the agency thought that any actions were needed to comply with CERCLA. The *PCS Nitrogen* decision ignored the due care exercised by Ashley and imposed a heightened standard of review by suggesting that BFPPs, because they know about the contamination, should be more careful. Ashley took proactive steps to remediate the contaminated land from the beginning of the cleanup process, and involved several agencies in remediation. These positive steps should constitute due care under CERCLA and the Brownfields Act, as these statutes were intended to promote voluntary cleanup and redevelopment.

The court’s decision to allocate liability in *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.* relied on the fact that the company knew about the contamination and took no affirmative action to rectify the problem. Because the court’s decision in *Kerr-McGee* relies on a complete lack of action to remediate the site, Ashley’s affirmative steps to purchase and clean the Charleston site with the intent to redevelop should demonstrate due care. Ashley purchased the site with the intention of remediat-

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111 Brief for Appellee, *supra* note 2, at 77–78.
112 See *Lashins Arcade*, 91 F.3d at 360–61; Brief for Appellee, *supra* note 2, at 78.
113 See EPA Interim Guidance, *supra* note 68, at 11.
115 See id. at 1543–44.
117 *Ashley II of Charleston*, 746 F. Supp. 2d at 752.
118 See *PCS Nitrogen*, 714 F.3d at 180–81.
119 See *Ashley II of Charleston*, 746 F. Supp. 2d at 723; Brief for Appellee, *supra* note 2, at 66.
120 See *PCS Nitrogen*, 714 F.3d at 180; *Ashley II of Charleston*, 746 F. Supp. 2d at 724, 725; Brief for Appellee, *supra* note 2, at 66–67.
122 Id.; Brief for Appellee, *supra* note 2, at 67.
ing and redeveloping the site for a sustainable, mixed-use project, and the company took active steps to ensure that the site was remediated.123 Ashley inspected all sumps and found that none of them leaked, yet still took affirmative actions to fill the sumps with concrete.124 Ashley’s contact with the EPA also demonstrated a willingness to cooperate and an intent to comply with the BFPP standard by taking reasonable steps to prevent further release of hazardous substances.125

Although the court did not rule on whether a BFPP needs to demonstrate a higher standard of due care than an innocent landowner, it effectively made such a ruling in its determination that Ashley was a PRP.126 This understanding of appropriate care in CERCLA is contrary to the statute and to the legislative history.127 The Brownfields Act and BFPP exemption are intended to lower the risk for purchasers and alleviate fears for developers, which will result in more cleanups around the country.128 The decision to impose a higher standard of care than normally used in CERCLA innocent landowner decisions will make it more difficult for prospective purchasers to use the BFPP defense and will chill cleanup and redevelopment.129 Businesses that might purchase land and buildings, understanding that the site needed to be remediated and with the intention of cleaning up the site and redeveloping the land, will now be much more risk averse, because there is a higher possibility that the party cleaning the site will be subject to joint and several liability.130

CONCLUSION

In affirming Ashley II of Charleston, LLC’s status as a potentially responsible party in PCS Nitrogen, Inc. v. Ashley II of Charleston, the U.S. Court of Appeals for the Fourth Circuit created a heavy burden for purchasers of contaminated land. Businesses that hope to purchase contaminated sites and redevelop the land will now be held to a strict standard of care, with limited room for minor mistakes. PCS Nitrogen will result in a chill in redevelopment projects and the remediation of far fewer contaminated sites.

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123 See Ashley II of Charleston, 746 F. Supp. 2d. at 699; Brief for Appellee, supra note 2, at 4.
124 Brief for Appellee, supra note 2, at 78.
125 See Ashley II of Charleston, 746 F. Supp. 2d. at 752; 3000 E. Imperial, 2010 WL 5464296, at *12.
126 Compare PCS Nitrogen, 714 F.3d at 180–81, with 3000 E. Imperial, 2010 WL 5464296, at *12.
127 See Pallone’s Statement, supra note 13; President Signs Brownfields Bill, supra note 13.
128 See Pallone’s Statement, supra note 13; President Signs Brownfields Bill, supra note 13.
129 See Brief for Appellee, supra note 2, at 67; Warren & Finger, supra note 69, at 10792.
130 See Brief for Appellee, supra note 2, at 67; Warren & Finger, supra note 69, at 10792.