

# CLIENT ALERT

June 19, 2020

1

## OHIO ADOPTS FEDERAL BONA FIDE PROSPECTIVE PURCHASER DEFENSE – WITH MORE PROGRESS ON BROWNFIELD REDEVELOPMENT TO COME?

by Madeline P. Fleisher

Effective September 15, 2020, Ohio will join the list of states that have incorporated the federal “Bona Fide Prospective Purchaser” (“BFPP”) defense to hazardous substance liability into state law, through the enactment of House Bill 168.<sup>1</sup> Although Ohio has previously offered a shield to state-level liability through its Voluntary Action Program, that mechanism requires issuance of a covenant not to sue by the Ohio Environmental Protection Agency.<sup>2</sup> The new statutory BFPP defense will offer property purchasers the advantage of being “self-implementing,” requiring no affirmative government approval to take effect.

The new BFPP defense from liability in acquiring a contaminated site, codified in Ohio Revised Code (“R.C.”) 3746.122, largely mirrors the federal defense under the Comprehensive Environmental Response, Compensation, and Liability Act.<sup>3</sup> Like the federal version, Ohio’s new BFPP defense applies where a person (or entity) acquires ownership of a facility after January 11, 2002, and can satisfy factors including: all disposal of hazardous substances at the facility occurred before the person’s acquisition; the person made “all appropriate inquiries” into the previous ownership and uses of the facility (*i.e.*, a Phase I Environmental Site Assessment); the person has exercised appropriate care in dealing with hazardous substances at the facility; the person cooperates with authorities in charge of any response action or natural resource restoration at the site; the person complies with applicable land-use restrictions or institutional controls established in connection with the response action at the facility; and, the person is not affiliated with a person that is potentially liable for contamination at the site. The Ohio legislature also drafted this provision to retroactively address causes of action arising prior to its enactment where the BFPP defense criteria are otherwise satisfied. Although, as noted in the accompanying legislative analysis, that aspect of the law could face a court challenge based on whether it is a “remedial” provision that can be applied retroactively consistent with the U.S. and Ohio Constitutions.<sup>4</sup>

The Ohio version of the BFPP defense does differ from the federal approach in that it does not provide blanket immunity from liability in any action brought by the federal government or a private citizen. Rather, the Ohio statute establishes that a person qualifying as a BFPP has immunity only in an action brought by the state to recover investigative or remedial costs, where the basis for liability is the person’s status as an owner or operator.<sup>5</sup> Despite this somewhat narrower scope, the availability of the BFPP defense in any civil action where the person acquired ownership of a facility after January 11, 2002 puts Ohio on a more even footing with surrounding states such as Michigan and Indiana, which have seen a significantly faster pace of brownfields redevelopment in recent years.

Notably, the passage of H.B. 168 arrives in tandem with another key step toward brownfields revitalization in Ohio: the introduction of House Bill 675, which would provide new funding for the existing Clean Ohio Revitalization Fund (“CORF”). Between 2002 and 2013, the Fund drew on the profits from the state’s liquor sales to support remediation of brownfields for redevelopment. However, as of 2013, those liquor profits were redirected to a new private nonprofit corporation, JobsOhio, tasked with economic development efforts in the state. JobsOhio no longer requires the full amount of those liquor revenues, and currently sends the excess back to the Ohio General Revenue Fund. H.B. 675 would re-dedicate those liquor profits to the Clean Ohio Revitalization Fund, potentially amounting to millions or tens of millions of dollars a year – and could provide yet another boost to brownfields redevelopment in Ohio.

### FOR FURTHER INFORMATION



**Madeline P. Fleisher** is Of Counsel in Dickinson Wright’s Columbus office. She can be reached at 614.591.5474 or [mfleisher@dickinsonwright.com](mailto:mfleisher@dickinsonwright.com).



**Anna M. Maiuri** is a Member and Co-Chair of the Environmental, Energy & Sustainability Practice Group in Dickinson Wright’s Troy office. She can be reached at 248-433-7558 or [amaiuri@dickinsonwright.com](mailto:amaiuri@dickinsonwright.com).



**Sharon R. Newlon** is a Member and Co-Chair of the Environmental, Energy & Sustainability Practice Group in Dickinson Wright’s Detroit office. She can be reached at 313-223-3674 or [snewlon@dickinsonwright.com](mailto:snewlon@dickinsonwright.com).



**Albert H. Acken** is a Member in Dickinson Wright’s Phoenix office. He can be reached at 602-285-5030 or [aacken@dickinsonwright.com](mailto:aacken@dickinsonwright.com).



**Samuel L. Lofland** is a Member in Dickinson Wright’s Phoenix office. He can be reached at 602-285-5039 or [slofland@dickinsonwright.com](mailto:slofland@dickinsonwright.com).

<sup>1</sup> 2020 H.B. No. 168, <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-168>.

<sup>2</sup> See R.C. Chapter 3746; Ohio Admin. Code Chapter 3745-300. H.B. 168 also amends the Voluntary Action Program so that nullification of the covenant not to sue is no longer automatic if the property owner violates a relevant use restriction. The revisions to R.C. 3746.05 provides the director of the Ohio Environmental Protection Agency with discretion to maintain the covenant not to sue if, for example, the property owner takes prompt action to remedy the misstep.

<sup>3</sup> 42 U.S.C. §§ 9601(40), 9607(r)(1).

<sup>4</sup> Ohio Legislative Service Commission, H.B. 168, 133rd General Assembly, Final Analysis at 5, available at <https://www.legislature.ohio.gov/download?key=14050&format=pdf>.

<sup>5</sup> R.C. 3746.122(B).

<sup>6</sup> House Bill 675, <https://www.legislature.ohio.gov/legislation/legislation-documents?id=GA133-HB-675>.<sup>7</sup> R.C. 122.65-122.658.

<sup>7</sup> R.C. 122.65-122.658.