



## Tenants Might Breathe a Little Easier

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In new guidance, the Environmental Protection Agency (EPA) has expanded the classes of tenants that, in the exercise of its enforcement discretion, it may consider Bona Fide Prospective Purchasers (BFPPs) on a site-specific basis. See “Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provisions” (2012) (“Tenant BFPP Guidance”). In the absence of BFPP treatment, tenants may be held liable under the Superfund law as the current operators (or even owners, in some cases) for the costs of cleaning up contaminated property that they occupy and of restoring any damaged natural resources. Per this new Guidance on the use of its enforcement discretion, EPA says that it will not seek to impose that liability on tenants of landlords that enjoy BFPP status or on those who meet all the BFPP criteria in their own right.

### Background

In 2002, brownfields revitalization efforts were lagging over 20 years after enactment of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 et seq. (“CERCLA”, popularly known as “Superfund”). CERCLA is the principal federal statute designed to clean up those contaminated sites and to exact the costs, not only from those responsible for the contamination, but from current owners and operators of the property, including tenants. The limited protection from liability that had been afforded to innocent purchasers of contaminated property by the 1986 amendments was conditioned upon the purchaser’s having completed all appropriate inquiry (“AAI”), such as a Phase I Environmental Assessment, prior to the purchase and still having no reason to know of the contamination. This situation created a Catch-22 for purchasers: if they looked and found nothing, perhaps their inquiry fell short of “appropriate”; but if their inquiry was thorough and found reason to suspect contamination, then they were no longer “innocent purchasers.” Either way, they faced the risk of future liability for pre-existing contamination. Under this cloud, contaminated sites were not being returned to productive uses.

To help resolve this dilemma and to reduce barriers to brownfields redevelopment, in 2002 Congress passed the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118 (2002). It amended CERCLA to add

conditional statutory protections against liability for BFPPs and for owners of property contiguous to contaminated sites. Among other things, the amendment added a new definition of the term “bona fide prospective purchaser” in CERCLA § 101(40). It then excluded such persons from liability in § 107(r), even if their AAI Environmental Assessment discovered the contamination, provided that they met the nine-pronged definition and do not impede cleanup or natural resource restoration. Congress also included tenants of qualifying BFPPs in its definition: “[BFPP] means a person (or a tenant of a person)” that proves by a preponderance of the evidence that it meets the criteria. CERCLA § 101(40).

#### BFPP Criteria

The purchaser seeking to assert BFPP protections must show:

1. It acquired ownership of the property after January 11, 2002, § 101(40);
2. All disposal of hazardous substances occurred before it bought the property, (40)(A) ;
3. It made an AAI assessment, (40)(B);
4. It makes all legally required notices concerning hazardous substances present, (40)(C);
5. It takes reasonable steps to stop any releases, prevent future ones and limit exposures, (40)(D);
6. It provides full cooperation, assistance and access for response actions, (40)(E);
7. It observes any land use restrictions and institutional controls, (40)(F);
8. It complies with any information requests or administrative subpoenas, (40)(G); and
9. It is neither potentially liable nor affiliated, contractually or otherwise, with anyone who is liable, except for a contract for the transfer of title or for goods or services. (40)(H).

#### The New Guidance

EPA's new Tenant BFPP Guidance supersedes its prior 2009 guidance on the subject, which restricted potential BFPP treatment for tenants to those who either (i) had derivative BFPP status from their landlords or (ii) held sufficient indicia of ownership to be considered “owners” and otherwise qualified themselves. As EPA has interpreted the BFPP provision in its new Tenant BFPP Guidance, any tenant that does not qualify for derivative BFPP treatment based on its landlord's status may do so in its own right by fulfilling all the requirements itself, even if it does not have indicia of ownership. Where the tenant has derivative BFPP status, then as long as the landowner maintains its BFPP status, the only conditions to the tenant's BFPP status are that (1) all hazardous substance disposal occurred prior to the acquisition, and (2) the tenant not impede any response action or natural resource restoration. But what if the landlord loses its BFPP status? For the tenant to maintain its BFPP status under those circumstances, the tenant must itself meet all

the criteria, except for the requirement for a pre-lease AAI Environmental Assessment.

To establish its own BFPP status independently of the landlord, a tenant must likewise meet all the criteria, including the completion of an AAI Environmental Assessment prior to signing the lease. The “no-affiliation” condition could be problematic, however. Where the landlord is potentially liable for cleanup costs, the lease is a contractual affiliation with a potentially responsible party and, as such, could represent a disqualifying affiliation. Strictly speaking, a lease may not fit within the exception for “instruments by which title to the facility is conveyed or financed or . . . a contract for the sale of goods or services.” CERCLA § 101(40)(H)(i)(II). EPA’s new guidance provides some comfort, however. It assures tenants of the Agency’s intent “to exercise its enforcement discretion on a site-specific basis by not treating the existence of a lease between the tenant and the owner as a prohibited affiliation.” Tenant BFPP Guidance, p. 4. The guidance also equates the date of the lease with the date of acquisition for purposes of satisfying the pre-acquisition disposal and AAI requirements.

As is usual with such enforcement guidance, the Tenant BFPP Guidance creates no rights to have EPA favorably exercise its enforcement discretion in a particular case. The Agency reserves the right to decline to exercise discretion where the lease seeks to enable the landowner to avoid CERCLA liability, where the tenant was involved in disposal at the site, or where the owner is not in compliance with regulatory requirements or orders. And EPA generally will not become involved with specific lease transactions or entertain requests for advance BFPP determinations. In some limited circumstances, however, it may consider a comfort letter or prospective lessee agreement in order to further the public interest.

## **Conclusion**

EPA’s new Tenant BFPP Guidance is a welcome expansion of the circumstances in which the Agency may use its enforcement discretion on a case-by-case basis not to pursue tenants on contaminated property. For tenants to benefit from these new terms, however, they must still perform appropriate due diligence prior to signing a lease, at the very least to assure themselves that the landlord completed an AAI Environmental Assessment prior to purchasing the property, and then assure that their landlord maintains compliance with the BFPP criteria thereafter. Alternatively, they must themselves satisfy both the AAI and the post-acquisition requirements. Even then, EPA’s favorable exercise of enforcement discretion affords no protection against third-party lawsuits for contribution. Nevertheless, the tenant that has complied with the BFPP elements as set forth in this Guidance will likely have a strong case against liability.

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