

CERCLA and Tenants as Bona Fide Prospective Purchasers: Obtaining and Maintaining BFPP Status

TUESDAY, AUGUST 29, 2017

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CERCLA and Tenants as Bona Fide Prospective Purchasers: Navigating Pitfalls in Obtaining and Maintaining BFPP Status

ADAM H. CUTLER AND DAVID M. MOORE

Outline

- ▶ Liability under CERCLA for tenants
- ▶ Overview of the BFPP defense
- ▶ Derivative BFPP status for tenants
- ▶ Direct BFPP status for tenants
- ▶ Comfort/status letters
- ▶ Best practices for tenants to obtain or maintain BFPP status

CERCLA Liability for Tenants

- ▶ CERCLA Liability is strict, joint and several (CERCLA 107)
- ▶ “Potentially responsible parties” (“PRPs”) may include a present owner or **operator** of a facility as well as one who owned or operated the facility in the past while it was contaminated
- ▶ Courts have subjected tenants to owner liability under CERCLA where sufficient indicia of ownership are present (e.g., exercise of control).
 - ▶ Courts have also held tenants liable under CERCLA as operators, based on management of activities causing or exacerbating contamination.
- ▶ Defenses:
 - ▶ Act of God
 - ▶ Act of War
 - ▶ BFPP – Bona Fide Purchaser for Value. BFPP defense provides protection against **“owner”** liability. CERCLA 107(r)

BFPP Defense

Notwithstanding subsection (a)(1) of this section, a bona fide prospective purchaser whose potential liability for a release or threatened release is based solely on the purchaser's being considered to be an owner or operator of a facility shall not be liable as long as the bona fide prospective purchaser does not impede the performance of a response action or natural resource restoration.

8

- ▶ Section 101(40) of CERCLA provides that a person must have “acquire[d] ownership” of the facility after January 11, 2002 in order to qualify for BFPP liability protection.
- ▶ Other requirements:
 - ▶ acquire ownership interest after the disposal of hazardous substances occurred on the property;
 - ▶ make “all appropriate inquiries” (AAI) into former uses and ownership of the property
 - ▶ Phase I Environmental Site Assessment that complies with EPA’s regulations or ASTM 1527, as revised (ASTM E1527-13);
 - ▶ provide required notices in regard to the discovery or release of hazardous substances; releases, and prevent or limit exposure to hazardous substances;
 - ▶ cooperate with governmental requirements (information requests, investigations, remediation, institutional controls, etc.)
 - ▶ not be affiliated with any PRP; and
 - ▶ “does not impede the performance of a response action or natural resource restoration.”

CERCLA 101(40); 107(q)(1)(C); 107(r)(1); 40 C.F.R. Part 312; PCS Nitrogen Inc. v. Ashley II of Charleston, LLC, 714 F.3d 161, 181 (4th Cir. 2013)

EPA Guidance

- ▶ EPA, “Revised Policy on the Issuance of Superfund Comfort/Status Letters” (August 25, 2015) (supersedes 1996 guidance)
- ▶ EPA, “Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision” (December 5, 2012)
- ▶ EPA, “Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants.” (January 14, 2009) IS SUPERSEDED by December 5, 2012 Guidance
- ▶ EPA, “Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections” (Sept. 21, 2011)
- ▶ EPA, “Issuance of CERCLA Model Agreement and Order on Consent for Removal Action by a Bona Fide Prospective Purchaser” (Nov. 27, 2006)
- ▶ EPA, “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) (March 6, 2003)
- ▶ EPA, “Bona Fide Prospective Purchasers and the New Amendments to CERCLA” (May 31, 2002)

BFPP Defense and Tenants

10

- ▶ CERCLA § 101(40) applies to a “person (or a tenant of a person)”



DEC 5, 2012

MEMORANDUM

SUBJECT: Revised Enforcement Guidance Regarding the Treatment of Tenants
Under the CERCLA Bona Fide Prospective Purchaser Provision

FROM: Cynthia Giles, Assistant Administrator
Office of Enforcement and Compliance Assurance

Mathy Stanislaus, Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Regional Administrators, Regions I-X

providing that a tenant may *derive* BFPP status from an owner who satisfies the BFPP criteria. The tenant remains a BFPP and is protected by section 107(r) from CERCLA liability as long as the owner maintains its BFPP status and: (1) all disposal of hazardous substances at the facility occurred prior to acquisition, as provided by section 101(40)(A); and (2) the tenant does not impede the performance of a response action or natural resource restoration, as provided by CERCLA § 107(r)(1). As long as the owner maintains compliance with the BFPP criteria, the tenant who has derived BFPP status does not have any independent duty to carry out those responsibilities (such as conducting AAI). However, if the owner loses its BFPP status whether by its own action or inaction or that of the tenant, in the EPA's view of CERCLA's provisions, the tenant generally would no longer be a tenant with derivative BFPP status.⁶

- ▶ Tenant remains a BFPP and is protected by section 107(r) from CERCLA liability as long as the owner maintains its BFPP status
- ▶ As long as the owner maintains compliance with the BFPP criteria, the tenant who has derived BFPP status does not have any independent duty to carry out those responsibilities (such as conducting AAI).
- ▶ If the owner loses its BFPP status, whether by its own action or inaction or that of the tenant, in the EPA's view of CERCLA's provisions, the tenant generally would no longer be a tenant with derivative BFPP status.

Two Scenarios:

- (1) Owner is BFPP
- (2) Owner is not BFPP



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WASHINGTON, D.C. 20460

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Madly Stanislaus, Assistant Administrator
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12

If a tenant has derivative BFPP status through the owner and the owner loses its status through no fault of the tenant, the EPA may exercise its enforcement discretion to treat the tenant as a BFPP under CERCLA § 107(a)(1). In this situation, the EPA intends to exercise its enforcement discretion on a site-specific basis if the tenant itself meets the BFPP provisions in CERCLA §§ 101(40) and 107(r)(1) (identified above in section II(a)), with the exception of the AAI provision.⁷ In general terms, as applied

Owner is BFPP



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13

- ▶ all disposal of hazardous substances at the facility occurred prior to execution of the lease;
- ▶ the tenant provides legally required notices;
- ▶ The tenant takes reasonable steps with respect to hazardous substance releases;
- ▶ the tenant provides cooperation, assistance, and access;
- ▶ the tenant complies with land use restrictions and institutional controls;
- ▶ the tenant complies with information requests and administrative subpoenas;
- ▶ the tenant is not potentially liable for response costs at the facility or “affiliated” with any such person (other than through the lease with the owner as further discussed below); and
- ▶ the tenant does not impede any response action or natural resource restoration.

“No Affiliation Requirement”

14

(H) No affiliation

The person is not—

(i) potentially liable, or affiliated with any other person that is potentially liable, for response costs at a facility through

(I) any direct or indirect familial relationship; or

(II) any contractual, corporate, or financial relationship (other than a contractual, or financial relationship that is created by the instruments by which title to the facility is conveyed or financed or by a contract for the sale of goods or services); or

(ii) the result of a reorganization of a business entity that was potentially liable.

Owner is Not BFPP



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 5, 2012

MEMORANDUM

SUBJECT: Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Best Management Practice Provision

FROM: Cynthia Giles, Assistant Administrator
Office of Enforcement and Compliance Assurance

Matth Stankaus, Assistant Administrator
Office of Solid Waste and Emergency Response

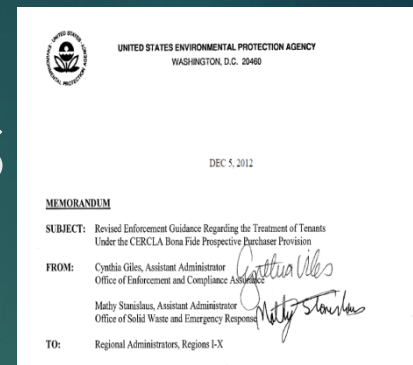
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15

c. Tenants Where the Owner is Not a BFPP⁹

With respect to a tenant who is not addressed under section II(b) of this guidance, the EPA intends to exercise its enforcement discretion on a site-specific basis to treat the tenant as a BFPP when the tenant itself meets all of the BFPP provisions in CERCLA §§ 101(40)(A)–(H) and 107(r)(1) (as identified above in section II(a)). In general terms, as applied to the tenant, those BFPP provisions are as follows:

Comfort/Status Letters



16

- ▶ Must make a request to EPA
 - ▶ Best if in writing to Region, and with landowner involvement
- ▶ Provide information on proposed use
- ▶ Information on prior use – focus on federal interest (ownership, cleanup)
- ▶ CERCLIS search, site history
- ▶ Reasonable steps with respect to hazardous substance releases
- ▶ “No action” assurances only with approval from Assistant Administrator of OECA (per 2015 Guidance)

Comfort/Status Letters



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Cynthia Giles
Matty Stanislaus

Matty Stanislaus, Assistant Administrator
Office of Solid Waste and Emergency Response

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17

- ▶ 2015 Guidance Model Letter (Federal Superfund Interest and No Current Federal Superfund Interest) contains Tenant as BFPP language:

[APPLICABLE TO TENANTS]

The EPA has issued enforcement discretion guidance regarding the potential applicability of the BFPP protection to tenants leasing contaminated or potentially contaminated sites. See *Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser* (Dec. 5, 2012) (“Revised Tenants Guidance”) [“(copy enclosed)” **or include appropriate URL - <http://www2.epa.gov/enforcement/guidance-treatment-tenants-under-cerclas-bona-fide-prospective-purchaser-bfpp-provision>**]. In general, the EPA intends to exercise its enforcement discretion to treat a tenant as a BFPP on a site-specific basis when that tenant meets certain BFPP criteria as described in the Revised Tenants Guidance. You and your legal counsel will need to assess whether you satisfy the requirements to be treated as a BFPP under the Revised Tenants Guidance.

Caveats of Comfort Letters

This letter is not otherwise intended to limit or affect the EPA's authority under CERCLA or any other law or provide a release from CERCLA liability. The EPA encourages you to consult with legal counsel and the appropriate state, tribal or local environmental protection agency before taking any action to acquire, clean up, or redevelop potentially contaminated property. It is your responsibility to ensure that the proposed use of the Property complies with any federal, state, local, and/or tribal laws or requirements that may apply. The EPA recommends that you consult with your own environmental professional to obtain advice on the compatibility of the proposed reuse.

Therefore, based on the information the EPA has to date regarding the Property, the EPA does not currently plan on taking federal response or enforcement action under CERCLA or RCRA at the Property.

Best practices for tenants to obtain or maintain BFPP status

- ▶ Owner as BFPP provides greater protection
 - ▶ Determine at time of lease execution
 - ▶ Track owner's BFPP status during lease
- ▶ Lease may include provisions providing lessee protection
 - ▶ Representations and warranties
 - ▶ Termination clauses
 - ▶ Indemnification
- ▶ Lease may also include provisions supporting tenant maintenance of BFPP status (e.g., mechanisms for providing access, notice and information)
- ▶ Document any BFPP obligations/requirements fulfilled
- ▶ Comfort letter may protect against liability to U.S., but not binding as to third parties

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