

McGUIREWOODS

EPA to Exercise Broader Enforcement Discretion Regarding Tenants as Bona Fide Prospective Purchasers under CERCLA

JAMES A. THORNHILL

804.775.1163 | JTHORNHILL@MCGUIREWOODS.COM

McGuireWoods LLP

One James Center

901 East Cary Street

Richmond, Virginia 23219-4030

December 14, 2012

www.mcguirewoods.com

McGuireWoods news is intended to provide information of general interest to the public and is not intended to offer legal advice about specific situations or problems. McGuireWoods does not intend to create an attorney-client relationship by offering this information, and anyone's review of the information shall not be deemed to create such a relationship. You should consult a lawyer if you have a legal matter requiring attention.

EPA has expanded its enforcement discretion regarding liability of tenants under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)¹ in a new guidance document entitled “Revised Enforcement Guidance Regarding Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision” dated December 5, 2012 ([2012 Tenant BFPP Guidance](#)). Pursuant to earlier guidance from 2009, EPA only recognized the bona fide prospective purchaser (BFPP) protection for tenants where the leasehold rights of a tenant equated with a purchase or where a landlord of the tenant was itself a BFPP and thus the tenant derived the BFPP protection from the landlord.² This derivative BFPP protection is consistent with the actual language of CERCLA.

EPA has now expanded its enforcement discretion to extend to a tenant who, similar to a purchaser seeking BFPP protection, meets the BFPP criteria. This summary provides the details of the new policy and what it actually means for tenants.

Background

PHASE I ENVIRONMENTAL SITE ASSESSMENTS

The Small Business Liability Relief and Brownfields Revitalization Act (Brownfields Act) signed into law by President Bush on Jan. 11, 2002, amended CERCLA to help stimulate the redevelopment of Brownfields. One of the requirements was for the EPA to develop its own Phase I environmental site assessment criteria called "all appropriate inquiries" (AAI).³ On Nov. 1, 2005, EPA published its AAI rule. The most important aspect of the AAI rule was that it specifically provided that a then new version of the ASTM “Phase I Site Assessment Process Standard” E 1527-05 (2005 ASTM Standard) may be used to meet AAI. Since the AAI rule went into effect, most Phase Is have been performed following the 2005 ASTM Standard.⁴

BONA FIDE PROSPECTIVE PURCHASERS

With the enactment of the Superfund Amendments and Reauthorization Act (SARA) in 1986 amending CERCLA came the "innocent purchaser defense." This allowed potential purchasers the ability to purchase property after performing a Phase I environmental site assessment, provided no concerns for releases for hazardous substances were identified. If a potential concern were found, then a purchaser either had to walk away from the purchase or understand that upon closing it would become an owner or operator under CERCLA and have liability for the contamination on the site. This was a material impediment to the purchase and redevelopment of Brownfields in particular.

The creation of the BFPP defense was meant to help alleviate this issue. In very simplistic terms, the BFPP defense allows a purchaser to conduct AAI and to purchase property with knowledge of hazardous substance contamination without incurring liability as an owner or operator. Many purchasers though do not focus on the additional requirements beyond AAI that must be met to maintain BFPP status.

¹ 42 U.S.C. § 9601, *et seq.*

² A summary of the 2009 Tenant BFPP Guidance is detailed in [Bona Fide Prospective Purchaser Defense under CERCLA: Post-Closing Concerns and Tenant Issue Update](#).

³ 40 C.F.R. pt. 312.

⁴ ASTM is currently working on updates to the 2005 Standard.

A BFPP is defined as “a person (or a tenant of a person)” that acquires ownership of a facility after the release of the hazardous substances and after Jan. 11, 2002, who meets the following criteria:

- Conducted “all appropriate inquiries” into the previous ownership and uses of the property.
- The disposal of hazardous substances on the site occurred before acquisition.
- Provide all legally required notices regarding the release.
- Provide full cooperation, assistance and access to those conducting response actions.
- Comply with institutional and engineering controls and do not impede the effectiveness.
- Comply with governmental requests for information and subpoenas.
- Not already liable, affiliated with a responsible party “(other than a contractual, corporate 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 simply the reorganized entity of a responsible party.
- Exercise appropriate care with respect to the hazardous substances found – stop continuing release, prevent threatened future release, and prevent exposure.

Tenants as BFPPs

2009 TENANT BFPP GUIDANCE

Although the BFPP defense in its basic form is for a “purchaser,” EPA issued guidance in early 2009 providing for two ways that a tenant may be a BFPP. The guidance document, “Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants” (2009 Tenant BFPP Guidance), provides that EPA will exercise enforcement discretion against tenants in the following categories:

1. A tenant whose lease gives sufficient indicia of ownership to be considered an “owner” and who meets the elements of §§ 101(40)(A)-(H) and 107(r)(1).
2. A tenant of an owner who is a BFPP.

The 2009 Tenant BFPP Guidance relies on the 2000 case of *Commander Oil v. Barlo Equip. Corp.*⁵ for criteria as to when a tenant may be an “owner” under CERCLA. The *Commander Oil* court considered whether a tenant had such extensive responsibilities under a lease that the tenant held sufficient “indicia of ownership” to be considered an owner of the property. The court focused on the responsibilities of the tenant, the ability of the tenant to make decisions concerning the property, the length of the lease, the range of permitted uses, the reservation of rights of the owner, and who was responsible for paying taxes and insurance and making repairs. EPA provides in the 2009 Tenant BFPP Guidance that it will consider such factors as to whether the tenant holds sufficient indicia of ownership to be an owner in exercising its enforcement discretion regarding the tenant being a BFPP.

The other instance where a tenant can be a BFPP under the 2009 Tenant BFPP Guidance is derived from the definition of BFPP under CERCLA, which includes a “tenant of a bona fide prospective purchaser.”⁶ The key is whether the landlord conducted AAI when the landlord purchased the property and continues to meet the requirements of a BFPP. It is a somewhat unusual aspect of the defense as it does not provide for the lease to be contemporaneous with the purchase. The landlord could have met the requirements in a purchase any time after Jan. 11, 2002, when the defense was added to CERCLA pursuant to the Brownfields Act.

⁵ 215 F. 3d 321 (2d Cir. 2000),

⁶ 42 U.S.C. § 9601(40).

Additionally, the 2009 BFPP Tenant Guidance provides that this derived defense to liability from the landlord requires that the tenant must not:

1. Dispose of hazardous substances or exacerbate existing hazardous substance contamination at the facility, or
2. Impede the performance of a response action or natural resource restoration.

2012 TENANT BFPP GUIDANCE

The 2012 Tenant BFPP Guidance does not address the issue of a tenant asserting the BFPP protection as an owner such as under the *Commander Oil* decision. Instead, the new guidance expands the BFPP protection by EPA stating that it will exercise enforcement discretion regarding liability of tenants under CERCLA essentially treating them as BFPPs just like a purchaser. The 2012 Tenant BFPP Guidance provides:

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: (1) all disposal of hazardous substances at the facility occurred prior to execution of the lease; (2) the tenant conducted AAI prior to execution of the lease; (3) the tenant provides legally required notices; (4) the tenant takes reasonable steps with respect to hazardous substance releases; (5) the tenant provides cooperation, assistance, and access; (6) the tenant complies with land use restrictions and institutional controls; (7) the tenant complies with information requests and administrative subpoenas; (8) 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 above in section II(b)); and (9) the tenant does not impede any response action or natural resource restoration.

Like a purchaser who wishes to assert the BFPP defense, the tenant protection will only apply to leases entered after January 11, 2002.

The new guidance also includes expanded enforcement discretion with regard to a tenant who derives the BFPP protection from its landlord being a BFPP. A concern under the 2009 guidance is that the landlord may take some action resulting in the loss of the BFPP protection, such as violating the land use restrictions imposed on the property. The new guidance provides that even if the landlord were to lose the benefit of the defense, a tenant could maintain it by meeting the criteria other than having to have performed its own Phase I.

CONCLUSION

This policy change fills a void in the CERCLA liability protections allowing tenants to follow the same steps as purchasers to enjoy the protection as a BFPP. Most major tenants of commercial or industrial property currently perform Phase I environmental assessments as a part of their due diligence anyway so the primary tool for the defense, a Phase I, is already part of the transaction. The added benefit is that a tenant will now know that EPA is unlikely to enforce if such tenant independently meets the BFPP criteria.

Tenants do have to keep in mind that EPA exercising enforcement discretion is not the same as actually having a defense to liability asserted by third parties such as a state. Use of the defense is still limited to a BFPP being defined as “a person (or a tenant of a person).” The language only explicitly covers tenants of a BFPP, and not the broader category of tenants who may meet the same criteria as a purchaser desiring to satisfy the BFPP criteria. Cases arise where multiple potentially responsible parties may end up in litigation, and whether one or more of them are BFPPs could be before the court independent of EPA having enforced. In both *3000 E. Imperial, LLC v. Robertshaw Controls Co.* (C.D. CA 2010),⁷ and *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.* (S.C. 2010)⁸, the courts were faced with determining whether parties met the criteria to assert the BFPP defense. While neither dealt with tenants asserting the defense, it highlights the fact that EPA is not the only party who could assert that a tenant has liability under CERCLA. Tenants also face some exposure due to the affiliation prohibition under the BFPP defense which EPA has indicated they will assess on a case-by-case basis. Finally, they also must consider whether state law defenses extend to tenants and whether other criteria must be met to assert them.

Tenants are advised to continue to take a conservative approach to their liability under CERCLA consistent with the 2009 Tenant BFPP Guidance when assessing potential liability to parties other than EPA and to consult with experienced counsel.

For more information on the 2009 Tenant BFPP Guidance and maintaining the BFPP defense, please see our [whitepaper](#) or contact Jim Thornhill at 804.775.1163 or jthornhill@mcguirewoods.com.

⁷ LEXIS 138 661.

⁸ LEXIS 104772.