



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 Bona Fide Prospective Purchaser Provision

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

Handwritten signature of Cynthia Giles in black ink.

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

Handwritten signature of Mathy Stanislaus in black ink.

TO: Regional Administrators, Regions I-X

I. Introduction

Section 107(r) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund), 42 U.S.C. § 9601 *et seq.*, provides an important liability protection for parties who qualify as bona fide prospective purchasers (BFPPs). This guidance discusses the potential applicability of the BFPP provision to tenants who lease contaminated or formerly contaminated properties, and how the Agency intends to exercise its enforcement discretion to treat certain tenants as BFPPs under CERCLA. This guidance supersedes the EPA's January 14, 2009 guidance titled "Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants."

Leasehold interests play an important role in facilitating the cleanup and reuse of contaminated properties. It is essential that such reuse is compatible with, and does not undermine the integrity and protectiveness of, cleanups. Under current CERCLA case law, the mere execution of a lease does not necessarily make a tenant liable as an owner or operator under CERCLA § 107(a). The EPA recognizes the uncertainty regarding the potential liability of tenants under CERCLA and the potential applicability of the BFPP provision in light of the explicit reference to tenants in CERCLA § 101(40). A prospective tenant may wish to seek BFPP treatment in the event of a future federal CERCLA action at the leased property and/or to ensure appropriate environmental stewardship of the property.

This guidance is intended to assist EPA personnel in exercising the Agency's enforcement discretion.¹ The EPA intends to apply this guidance on a site-specific basis only to the extent appropriate based on the facts regarding the property. This guidance is not a rule and it does not create new liabilities or limit or expand obligations under any federal, state, tribal, or local law. It is not intended to and does not create any substantive or procedural rights for any person at law or in equity. In addition, this guidance does not alter the EPA's policy of not providing "no action" assurances outside the context of a legal settlement or formal enforcement proceeding.²

II. Discussion

a. CERCLA Liability and the BFPP Exclusion

Section 107(a)(1) of CERCLA provides that "the owner and operator of a vessel or facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . (A) all costs of removal or remedial action incurred by the United States Government" Thus, without liability protection, an owner or operator of contaminated property is a potentially liable party under CERCLA. Section 107(r)(1) of CERCLA provides statutory liability protection for certain owners or operators of property, called bona fide prospective purchasers or "BFPPs." CERCLA § 107(r)(1) states:

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.

In general terms, CERCLA § 101(40)(A)-(H)³ defines a BFPP as "a person (or a tenant of a person) that acquires ownership of a facility after [January 11, 2002]" and that establishes that:

- all disposal of hazardous substances at the facility occurred prior to acquisition;
- the person conducted all appropriate inquiry (AAI) into the previous ownership and uses of the facility;⁴
- the person provides legally required notices;

¹ Exercising enforcement discretion involves, among other things, evaluating a number of factors, including the status of a particular matter, allocation of Agency resources, potential litigation risk, potential cost recovery, and equitable considerations. This guidance does not address all the circumstances in which the EPA may choose to exercise enforcement discretion with respect to a party under CERCLA, nor does it cover all of the statutory or other protections that may be available to a party at contaminated or formerly contaminated property. Please note that although this guidance is being issued jointly by OSWER and OECA, the authority to exercise enforcement discretion is delegated to OECA.

² See "Applicability of Policy against 'No Action' Assurances to CERCLA" (Breen, OSRE 2000); "Processing Requests for Use of Enforcement Discretion" (Herman, OECA 1995); "Policy Against 'No Action' Assurances" (Price, OECM 1984).

³ See 42 U.S.C. §§ 9601(40)(A)-(H) and 9607(r) for a complete description of the BFPP protection criteria.

⁴ For more information about AAI, please see the AAI regulations found at 40 C.F.R. pt. 312 and the EPA's AAI webpage at <http://www.epa.gov/brownfields/aai/index.htm>.

- the person takes reasonable steps with respect to hazardous substance releases;
- the person provides cooperation, assistance, and access;
- the person complies with land use restrictions and institutional controls;
- the person complies with information requests and administrative subpoenas; and
- the person is not potentially liable for response costs at the facility or “affiliated” with any such person.

The EPA previously issued guidance to assist in the Agency’s application of the BFPP provision. *See* “Enforcement Discretion Guidance Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections” (Gilberg, 9/21/11)(“Affiliation Guidance”); “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” (Bromm, 3/6/2003).⁵ These guidance documents address many of the criteria a landowner must meet to qualify under the statute as a BFPP. As discussed below, these guidance documents also provide important information on the EPA policies that may relate to tenants who may fall within the scope of this guidance.

b. Tenants Where the Owner is a BFPP

The BFPP definition in CERCLA § 101(40) applies to a “person (or a tenant of a person),” thereby 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

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

⁵ These documents are available from the Agency’s website at: <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

⁶ Because the BFPP protection is self-implementing – by the owner asserting that status – as a practical matter it may be difficult for a tenant to know with certainty whether the owner has qualified for and continues to maintain BFPP status. Thus, tenants with derivative BFPP status may need to evaluate independently whether the BFPP criteria are being met in order to assess their own status as a BFPP.

⁷ Because AAI already has been conducted by the owner, the EPA does not expect a tenant to conduct AAI under these circumstances. It should be noted, however, that a tenant may still wish to obtain information on the prior uses of the facility

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 provides legally required notices; (3) the tenant takes reasonable steps with respect to hazardous substance releases; (4) the tenant provides cooperation, assistance, and access; (5) the tenant complies with land use restrictions and institutional controls; (6) the tenant complies with information requests and administrative subpoenas; (7) 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 (8) the tenant does not impede any response action or natural resource restoration.

With respect to the “no affiliation” provision, CERCLA § 101(40)(H)(i)(II) provides an exception where the affiliation “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.”⁸ Thus, a person can acquire title to a property from a liable party and still establish itself as a BFPP. A lease generally does not convey title to the property and thus would not fall within the scope of the exception. For purposes of this guidance, however, the EPA intends 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.

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: (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.

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. For purposes of exercising its enforcement discretion on a site-specific basis with respect to this provision under this section, the EPA

to have an informed basis on which to perform these actions (1-8 in the text above) should its owner lose BFPP status and the tenant wants to be treated as a BFPP under this paragraph.

⁸ For more information about this exception, please see the Affiliation Guidance (p. 6-7).

⁹ As stated above, this guidance supersedes the 2009 guidance titled “Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA § 101(40) to Tenants.” One category of the 2009 guidance focused on tenants with sufficient indicia of ownership to be an owner for purposes of liability under CERCLA. In this revised guidance, this category has been expanded to include tenants of parties who are not BFPPs regardless of whether those tenants have sufficient indicia of ownership to be an owner for purposes of liability under CERCLA.

intends to treat tenants as BFPPs if their lease agreement was executed after January 11, 2002 and they meet the other BFPP provisions outlined above.

III. Limitations of this Guidance

The EPA may decline to exercise its enforcement discretion described in this guidance under various circumstances. For example, if the lease is designed to allow the landlord or tenant to avoid its CERCLA liability, or the tenant is potentially liable for reasons other than its status as a tenant (e.g., it arranged for disposal of hazardous substances at the facility), then the EPA would likely decline to exercise its enforcement discretion. The EPA also may decline to exercise its enforcement discretion when the owner is not in compliance with state or federal regulatory requirements or administrative or judicial cleanup orders or decrees relating to the leased property.

IV. Tools to Address Tenant Liability Concerns

The statutory protection found at CERCLA § 107(r)(1) is self-implementing and the EPA generally will not be involved with facility-specific transactions or determinations of BFPP status. Similarly, the EPA generally will not engage in site-specific determinations on the applicability of this enforcement discretion guidance. There may be limited instances, however, where the EPA determines that it would be necessary and appropriate to address a tenant's concerns at a particular property through an existing tool (e.g., a comfort/status letter or a prospective lessee agreement).¹⁰ In addition, the EPA may use such tools on a case-by-case basis where it is appropriate to address the concerns of tenants not covered by this guidance in order to further the public interest.

V. Agency Contacts

For more information or questions about this guidance, please contact Susan Boushell at 202-564-2173 (boushell.susan@epa.gov) or James Miles at 202-564-5161 (miles.james@epa.gov) in the Office of Enforcement and Compliance Assurance, or Brigid Lowery at 202-566-0198 (lowery.brigid@epa.gov) in the Office of Solid Waste and Emergency Response.

cc: Regional Counsel, Regions I-X
Superfund National Policy Managers, Regions I-X
Elliott J. Gilberg, Director, Office of Site Remediation Enforcement
Brigid Lowery, Director, Center for Program Analysis
David R. Lloyd, Director, Office of Brownfields and Land Revitalization
James E. Woolford, Director, Office of Site Remediation and Technology Innovation
Reggie Cheatham, Director, Federal Facilities Restoration and Reuse Office
Mary Kay Lynch, Associate General Counsel, Office of General Counsel
Ben Fisherow, Chief, Environmental Enforcement Section, Department of Justice
EPA Renewable Energy Liability Workgroup
EPA RE-Power Team
EPA BART National Workgroup

¹⁰ For a listing of the available tools and policies, including the EPA's policy on the issuance of comfort letters, see: <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.