

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2013

PHILADELPHIA, FRIDAY, MARCH 8, 2013

VOL 247 • NO. 46

An **ALM** Publication

Bona Fide Prospective Tenant Endorsed as New CERCLA-Protected Class

BY DIANA A. SILVA

Special to the Legal

The U.S. Environmental Protection Agency recently issued new guidance that will help tenants leasing contaminated property to minimize their risk of environmental liability under the Comprehensive Environmental Response, Compensation, and Liability Act, commonly known as CERCLA. Although guidance documents do not create binding law, the EPA's new "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision," issued on December 5, 2012, should provide additional comfort to conscientious tenants. The guidance outlines how the EPA will choose to exercise, or rather not to exercise, its enforcement discretion to hold tenants liable as "owners" or "operators" of contaminated facilities under §107(a) of CERCLA. This guidance clarifies when and how tenants leasing contaminated property can avail themselves of the bona fide prospective purchaser or BFPP defense, and creates renewed opportunities for redevelopment and reuse of brownfield properties that otherwise may present too significant a risk for prospective tenants.



DIANA A. SILVA is an attorney with the environmental, energy and land use law and litigation firm of Manko, Gold, Katcher & Fox in Bala Cynwyd, Pa. She can be reached at dsilva@mankogold.com or 484-430-2347.

CERCLA imposes strict liability on owners and operators of contaminated property for all costs associated with releases or threatened releases of a hazardous substance. However, in the 2002 Small Business Liability Relief and Brownfields Revitalization Act amendments to CERCLA, Congress created the BFPP exception to CERCLA liability as a means of encouraging redevelopment and beneficial reuse of contaminated properties. Creation of the BFPP exception allowed purchasers for the first time to knowingly acquire contaminated property without simultaneously buying themselves the property's associated CERCLA liability.

BFPPs are shielded from CERCLA liability for releases of hazardous substances at a site if the BFPP's potential liability is based solely on their position as the current owner/operator of the property, and so long as the BFPP complies with all elements of the defense. CERCLA defines a

BFPP to include any person, or tenant of a person, who acquires ownership of a contaminated property after January 11, 2002, and who can establish the following eight criteria: (1) the property was acquired after all disposal of hazardous substances ceased; (2) prior to closing, performed "all appropriate inquiry" or AAI, into the former uses and ownership of the facility, (generally requiring the completion of a Phase I site assessment); (3) provides all legally required notices regarding releases of hazardous substances; (4) takes reasonable steps to stop any continuing releases of hazardous substances and/or prevent future releases; (5) fully cooperates with any response actions at the facility; (6) complies with land use restrictions or institutional controls at the facility; (7) complies with government information requests and administrative subpoenas; and (8) is not itself a potential liable party at the facility, nor is "affiliated" with such a person. The BFPP exemption is strictly construed, and BFPPs must satisfy all of the requisite elements to take advantage of the defense.

While tenants are explicitly included in the statutory definition of a BFPP, there has been significant confusion regarding when a tenant may be excused from CERCLA liability under the BFPP defense, prompting the EPA

to issue its most recent CERCLA guidance. The revised guidance clarifies that a tenant can be shielded from CERCLA liability either because (1) the tenant derives BFPP status from its lessor who itself is a BFPP, or (2) when the tenant independently satisfies the BFPP criteria. This second category — where the tenant can maintain independent, rather than derivative BFPP status — is a key EPA policy development.

The BFPP exemption is strictly construed, and BFPPs must satisfy all of the requisite elements to take advantage of the defense.

Derivative BFPP tenants typically will be immune from liability only so long as the owner maintains its BFPP status, and only if the disposal of hazardous substances occurred before the tenancy commenced, and where the tenant in no way impedes cleanup activities at the site. Aside from these requirements, as long as the lessor remains a BFPP, the tenant has no other BFPP responsibilities. However, if the lessor loses its BFPP status — perhaps unbeknownst to the lessee — so too does the tenant. As a practical matter, it may be difficult for an existing tenant who wishes to avail itself of derivative BFPP protection

to determine whether the lessor is a BFPP, the scope of the lessor's pre-acquisition AAI, and whether the lessor is currently abiding by all of the BFPP requirements to maintain this protected status.

To reduce the risks inherent in tenancy at a contaminated property, and to further spur beneficial reuse of such property, the revised guidance enables tenants to affirmatively act to protect themselves. The guidance encourages derivative BFPP tenants to perform proper due diligence to independently determine whether their lessors have satisfied all BFPP criteria, so that the derivative BFPP tenant can determine whether it is similarly insulated from liability. Derivative tenants should seek information regarding prior uses of the property as part of their comprehensive due diligence prior to leasing any potentially contaminated site. Proper due diligence can not only help a tenant if its landlord loses BFPP status, but can also provide a basis for the tenant to be considered a BFPP in its own right. A tenant can independently assert BFPP status if it satisfies all eight of the listed BFPP criteria, including performing an AAI analysis before executing the lease. While this may entail additional up-front costs, performing the necessary AAI during lease negotiations may be more cost-effective in the long run than relying on the lessor to satisfy the BFPP criteria. Independent BFPP tenant status also assures greater control and predictability, as the tenant will retain protection against CERCLA liability regardless of the lessor's BFPP standing.

It is important to keep in mind, however, that a BFPP tenant cannot escape CERCLA liability if it is a potentially responsible party on some other basis, such as if it had actively disposed hazardous substances at the site or arranged for such disposal, or if the tenant improperly disposes of hazardous substances during its tenancy. Furthermore, the continuing obligations imposed on tenants to maintain BFPP status may be costly and significant, requiring tenants to, among other things, maintain institutional controls and to properly respond to future releases that may occur at the property. The scope of BFPP protection is also limited — it only protects a party from CERCLA liability and not from claims asserted under other federal or state environmental statutes or regulations, nor is it a defense to common law claims for property damage or personal injury.

At the end of the day, although the BFPP defense is not ironclad for lessors or tenants, tenants that actively safeguard themselves, rather than relying on their landlords, can receive an additional layer of protection from environmental risk, and will be better positioned to successfully assert a BFPP defense to any CERCLA claims associated with their leased property. •

Reprinted with permission from the March 8, 2013 edition of THE LEGAL INTELLIGENCER. © 2013 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 347-227-3382, reprints@alm.com or visit www.almreprints.com. # 201-03-13-01.