



Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants: Frequently Asked Questions

Office of Site Remediation Enforcement

Where can I obtain a copy of EPA's Tenants as BFPPs Guidance?

EPA's January 14, 2009 guidance titled, "Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants" ("Tenants Policy"), is available at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/bfpp-tenant-mem.pdf>

What is a bona fide prospective purchaser?

A bona fide prospective purchaser, or "BFPP", is "a person (or tenant of a person) that acquires ownership of a facility after [January 11, 2002]" and establishes that it meets certain threshold criteria and ongoing obligations identified at section 101(40)(A)-(H) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). BFPP status provides a landowner with protection against CERCLA owner liability and, if maintained, limits EPA's recourse against a BFPP for unrecovered response costs to a lien on property for the lesser of the amount of unrecovered costs or the increase in the property's fair market value attributable to EPA's response action. CERCLA provides that tenants may be eligible to achieve BFPP status, as evidenced by the definition of BFPP in CERCLA section 101(40), which includes the phrase "tenant of a person."

How does the Tenants Policy impact a tenant's ability to achieve BFPP status to protect against owner liability under CERCLA section 107(a)?

Because the definition of BFPP includes the phrase "tenant of a person," a tenant may derive BFPP status from an owner who satisfies the BFPP requirements. The tenant will remain a BFPP so long as the property owner maintains its BFPP status and the tenant does not (1) dispose of hazardous substances at the facility, or (2) impede the performance of a response action or natural resource restoration. In addition, the Tenants Policy sets forth situations in which EPA may exercise its enforcement discretion to treat certain tenants as BFPPs, independent of the property owner's status. Enforcement discretion might be appropriate when the owner loses its own BFPP status (through no fault of the tenant), or when the tenant has certain indicia of ownership sufficient to be considered an "owner" under CERCLA and the tenant meets the requirements of CERCLA sections 101(40)(A)-(H) and 107(r)(1).

Can tenants be liable as an “owner” under CERCLA section 107(a)?

Yes, the United States Second Circuit Court of Appeals has found that certain lessees may have the requisite “indicia of ownership” of a property in order to be considered “owners” of a property for the purposes of CERCLA liability. *Commander Oil v. Barlo Equip. Corp.*, 215 F.3d 321 (2d Cir. 2000). In this case, the court looked closely at the lease to determine the extent of the tenant’s responsibilities at the property, the autonomy of the tenant in making decisions regarding the property, and the authorization given by the owner for the tenant’s use of the property. Although the court did not specifically state which “indicia of ownership” would be sufficient to result in a finding of ownership for purposes of CERCLA liability, it mentioned factors like the length of the lease, the range of permitted uses, the need for prior permission from the owner for certain actions, reserved rights on the property by the owner, and who is responsible for taxes, insurance, and repairs. *Id.* at 331-32.

How will a tenant determine if it is a potentially responsible party under CERCLA or if it is eligible for BFPP status?

The protections afforded by BFPP status are self-implementing and, therefore, EPA does not make determinations as to whether a party qualifies for BFPP status. However, in exercising its enforcement discretion pursuant to the Tenants Policy (e.g., in deciding whether to treat a party as a BFPP in an enforcement action or a settlement), EPA will look at the site-specific facts. For example, in deciding to exercise its enforcement discretion pursuant to the Tenants Policy with respect to a tenant with indicia of ownership, EPA would evaluate whether the tenant’s lease agreement was entered into after January 11, 2002, and the tenant is complying with the requirements of CERCLA sections 101(40)(A)-(H) and 107(r)(I). EPA recommends that tenants seek legal counsel if they have concerns regarding CERCLA liability, their status as a BFPP status, or the protections afforded by BFPP status.

How does a tenant “derive” BFPP status from the lessor/owner?

A tenant may derive BFPP status from an owner who has satisfied and continues to maintain the BFPP requirements in section 101(40)(A)-(H) and does 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.

How does an owner maintain its BFPP status such that a tenant may derive its BFPP status from the owner?

After initially qualifying as a BFPP, an owner must maintain compliance with the requirements of CERCLA section 101(40)(B)-(H). So long as the owner remains in compliance, the tenant has no independent duty to carry out those responsibilities.

What happens to a tenant's liability status if the owner loses its BFPP protection?

If the tenant's protections are derived from the owner's BFPP status, and the owner then loses its BFPP status, the tenant would no longer enjoy protection from liability. However, EPA may, depending on site-specific circumstances, exercise its enforcement discretion and treat the tenant as a BFPP, so long as the tenant:

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

See CERCLA sections 101(40) and 107(r). If the tenant has sufficient "indicia of ownership" in order for EPA to exercise its enforcement discretion pursuant to the Tenants Policy (see above), then the owner's loss of BFPP status will not impact the possible exercise of EPA's enforcement discretion.

What if the loss of the owner's BFPP status is through no fault of the tenant?

If a tenant derives its BFPP status through the owner and the owner loses its status through no fault of the tenant, EPA may exercise its enforcement discretion not to pursue the tenant under CERCLA section 107(a)(1). EPA will make a site-specific determination based on the seven requirements listed in the prior FAQ. There is no "All Appropriate Inquiry" into the previous ownership and uses of the property requirement under CERCLA section 101(40)(B)(i) for a tenant with derivative BFPP status, as is required for owners of property to achieve BFPP status. However, a tenant may want to obtain information on the prior uses of the property to have an informed basis on which to meet with the above criteria.

Does a lease agreement with a liable party constitute an affiliation in violation of CERCLA section 101(40)(H)?

CERCLA section 101(40)(H) provides that a person cannot achieve BFPP status if that person is affiliated with a liable party. Affiliations can result from familial, contractual, corporate, or financial relationships. There is an exception where the affiliation "is created by the instruments by which title to the facility is conveyed or financed..." CERCLA section 101(40)(H)(i)(II). Because there is no title transfer, a lease does not fall within the exception and, therefore, a lease with a liable party would constitute an "affiliation." However, where a tenant has sufficient indicia of ownership to be considered an owner, EPA intends to exercise its enforcement discretion not to pursue the tenant under CERCLA section 107(a)(1) so long as the other requirements in CERCLA sections 101(40) and 107(r) are satisfied. If the tenant is otherwise affiliated with the PRP owner or has an affiliation with another responsible party at the site, 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, then EPA will likely decline to exercise its enforcement discretion.

Does EPA provide determinations of BFPP status on a site-specific basis?

No, CERCLA sections 101(40) and 107(r)(1) are self-implementing. In very limited circumstances, EPA may determine it is necessary and appropriate to address a tenant's liability concerns, e.g. through a comfort/status letter or a prospective lessee agreement.

Does this guidance limit EPA's ability to enforce CERCLA?

No, this guidance does not limit EPA's ability to enforce CERCLA where appropriate. EPA may deviate from this guidance as necessary and appropriate based on the facts of each case. This guidance is not intended to create new liabilities or limit or expand obligations.

Questions regarding this reference sheet or EPA's Tenants as BFPPs Guidance or prospective lessee agreements should be directed to Susan Boushell in EPA's Office of Site Remediation Enforcement (202-564-2173, boushell.susan@epa.gov) or to the EPA Regional contacts listed below. Questions regarding comfort/status letters or prospective lessee agreements should be directed to Hollis Lucecky in EPA's Office of Site Remediation Enforcement (202-564-4217, lucecky.hollis@epa.gov) or to the Regional contacts listed below.

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This document is intended for employees of EPA and the Department of Justice and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. This document is not intended as a substitute for reading the statute or EPA's January 14, 2009 Guidance titled "*Enforcement Discretion Guidance Regarding the Applicability of the Bona Fide Prospective Purchaser Definition in CERCLA Section 101(40) to Tenants.*" Readers are strongly encouraged to review the guidance for more specific information on EPA's Tenants Policy.