

ENVIRONMENTAL ALERT

TENANTS NOW ELIGIBLE FOR ENVIRONMENTAL LIABILITY PROTECTION UNDER NEW U.S. EPA POLICY

The U.S. Environmental Protection Agency (EPA) has released new guidance that extends significant legal protection to tenants who lease contaminated property. EPA's new policy allows tenants to qualify for protection from environmental liability for pre-existing contamination when the tenant conducts appropriate due diligence into the environmental condition of the property prior to leasing the property. Previously, such liability protection had only been available to purchasers of property. The extension of liability protection to tenants provides significant benefits and comfort to lessees of contaminated property.

This new policy provides an additional legal tool to tenants looking to protect themselves from environmental liabilities, and should facilitate reuse of brownfields and other contaminated properties. It has always been advisable to conduct a Phase I environmental site assessment prior to acquiring an interest in property, whether an ownership or a leasehold interest, especially where that property has potentially been environmentally impacted by prior activities there or on neighboring property. Indeed, it has arguably become a minimum standard of practice to conduct such an evaluation. Now, as described below, EPA's new guidance provides a concrete return benefit to tenants for conducting a Phase I or other equivalent evaluation of environmental conditions. In combination with continued careful attention to the terms and provisions of their lease, which remains as critical as ever, tenants can now access a greater degree of protection from environmental liabilities. Since EPA's new policy provides safety from EPA enforcement, but not state enforcement, and not necessarily from private party suits to recover cleanup costs, tenants are well advised not to rely on this policy, alone, to protect their interests.

The liability protection is provided under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly referred to as the "Superfund" law. Superfund is the federal law that imposes liability for environmental cleanup on owners and operators of contaminated property, and does so even if they had no involvement with causing such environmental contamination. In 2002, in order to encourage reuse of contaminated properties (i.e. Brownfield Sites), Congress added provisions to CERCLA that provided for liability protection for certain qualified purchasers of property. Termed "bona fide prospective purchasers" or "BFPPs", such purchasers could acquire contaminated property without assuming liability for cleanup of pre-existing contamination. Congress limited BFPP status to parties who had no involvement, responsibility or relationship to prior contamination of the property. A BFPP must conduct due diligence, known as "all appropriate inquiries", into the environmental condition of the property prior to the purchase of the property and must exercise due care with respect to any contamination of the property after the purchase. If these conditions are fulfilled, the purchaser, qualifying as a BFPP, is protected from liability for the pre-existing contamination.

The BFPP protections were a significant step forward for CERCLA. Previously, there was a very limited innocent purchaser defense, which was so restricted that it helped only a very small number of purchasers. In particular, the innocent purchaser defense was unavailable when past environmental impacts were known to the purchaser. In practice, it is a much more common situation in that a purchaser has awareness of potential environmental conditions on a property prior to purchase. The 2002 BFPP

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provisions removed this obstacle for purchasers. Now, tenants can take advantage of the same liability protection.

The action required to qualify for BFPP status prior to acquiring an interest in property, which is a prerequisite to liability protection, includes the following elements:

- any disposal of hazardous substances must have occurred prior to acquiring the interest in the property;
- conduct of all appropriate inquiry (AAI) into the previous ownership and uses of the facility, which includes a site visit, review of available records databases, interviews with knowledgeable persons and consideration of other available information, in order to determine if there were releases or the potential for releases of hazardous substances at the property based on past uses of the property or neighboring properties;
- provision of all legally required notices;
- taking of reasonable steps with respect to hazardous substance releases;
- provision of cooperation, assistance, and access to government agencies;
- compliance with land use restrictions and institutional controls;
- compliance with information requests and administrative subpoenas; and
- no pre-existing liability for response costs at the property, or affiliation with any responsible party.

These requirements are set forth in more detail in CERCLA and its accompanying regulations. More commonly, however, the key element of the All Appropriate Inquiry is satisfied by the conduct of a Phase I Environmental Site Assessment consistent with the Phase I standards established by ASTM in its E1527-05 Standard Practice For Environmental Site Assessments: Phase I Environmental Site Assessment Process. (The ASTM Phase I standard is currently being revised and updated; prospective tenants should ensure that any Phase I meets the standard in effect at the time of the lease).

EPA's new guidance for tenants also clarifies and confirms that when a tenant leases property from an owner where such owner is a BFPP, the tenant may also take advantage of the liability protections acquired by the owner, without the need to conduct its own due diligence inquiry. The guidance also provides that such a tenant may continue to avail itself of the liability protection even if the owner takes some action that deprives the owner of BFPP status through no fault of the tenant. The tenant may only do so, however, where it had no involvement in any disposal of hazardous substances, provides all legally required notice, takes reasonable steps to address any hazardous substance releases, and otherwise is cooperative with government authorities and land use restrictions, as applicable.

As stipulated in establishing BFPP status, both tenants and purchasers of contaminated property must take reasonable steps with respect to the contamination after acquiring an interest in such property in order to maintain their liability relief. In most instances, this may amount to nothing more than not disturbing or exacerbating the situation. In a limited set of other instances, this may require taking affirmative steps to prevent contamination from continuing to spread.

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It is also important to note that EPA's policy is a policy regarding its use of enforcement discretion, and is not an amendment to the Superfund law itself. For example, should EPA determine that a lease of contaminated property is designed with the purpose to allow a landlord or tenant to avoid CERCLA liability, or if a tenant is responsible for the contamination outside of its status as a tenant, then EPA would likely seek to impose liability on such a tenant, and would have the authority to do so. However, it is anticipated that any such circumstance would be an extremely small minority of situations. It should also be noted that EPA's policy only provides relief from federal Superfund liability; other liabilities may be imposed by state law, and state laws on the subject vary from state to state (but are typically not more stringent than Superfund.) Additionally, since EPA's policy is one of enforcement discretion, it will not bar CERCLA suits by private parties for recovery of cleanup costs.

Finally, this new ability of tenants to receive protection from environmental liabilities under CERCLA should not eclipse the importance of careful negotiation and drafting of lease terms for the property in question. Existing tools, such as limited ground leases and attention to defining the baseline condition of the property prior to lease, as well as indemnification and insurance provisions, remain key components to a comprehensive approach to limiting exposure to environmental liabilities. Eckert Seamans has substantial experience in using these negotiating and contractual tools, in combination with evaluating the environmental risks posed a property and in establishing BFPP protection from liability.

Overall, the new EPA policy provides significant benefits to tenants of contaminated property. All prospective tenants are advised to conduct appropriate due diligence prior to leasing property with potential environmental contamination or impacts. This due diligence should be conducted by an appropriately qualified environmental consultant, with the oversight of knowledgeable legal counsel.

If you have any questions or need assistance regarding any of the information noted above please contact David A. Rockman at 412.566.1999 or drockman@eckertseamans.com. Mr. Rockman is a Member in Eckert Seamans' Environmental Practice Group. Mr. Rockman regularly advises clients with regard to environmental issues in connection with the purchase, sale and leasing of property. Mr. Rockman is a member of ASTM's Environmental Assessment, Risk Management and Corrective Action Section, and a participant in ASTM's activities to update the existing Phase I standard.

The Environmental Alert is intended to keep readers current on matters affecting environmental issues and is not intended to be legal advice. For information or assistance regarding any environmental issues or other legal issue, please contact Richard S. Wiedman at 412.566.5967 or rwiedman@eckertseamans.com, Scott R. Dismukes at 412.566.1998 or sdismukes@eckertseamans.com, David A. Rockman at 412.566.1999 or drockman@eckertseamans.com, Kathryn L. Clark at 412.566.6188 or kclark@eckertseamans.com, Erin W. McDowell at 412.566.6070 or emcdowell@eckertseamans.com, Jessica L. Sharrow at 412.566.5941 or jsharrow@eckertseamans.com or any other attorney with whom you have been working.