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ENVIRONMENTAL & NATURAL RESOURCES

IN THE NEWS

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January 2013

An Environmental Alert: EPA Revises Guidance on Bona Fide Prospective Purchaser Protection for Tenants Under Federal Superfund Law

On December 5, 2012, the United States Environmental Protection Agency (EPA) revised its [enforcement guidance](#) regarding when tenants may be treated as bona fide prospective purchasers (BFPPs). The revised guidance addresses lessees who were not previously covered by the old guidance because the owner never qualified as a BFPP and the tenant lacked "sufficient indicia of ownership" to be considered an "owner." The new guidance applies to all tenants regardless of the tenant's "indicia of ownership."

Bona Fide Prospective Purchasers

Under federal Superfund law, current owners and operators of contaminated property generally are liable for the costs to clean up the contamination. Prospective purchasers can avoid liability associated with being a current owner of contaminated property by meeting certain statutory criteria to qualify as a BFPP.

For the BFPP criteria, click [here](#).

When Tenants May Be BFPPs

EPA has clarified that a tenant may be treated as a BFPP where:

- the owner is a BFPP and the tenant does not impede the performance of a response action or natural resource restoration;
- an owner has lost BFPP status through no fault of the tenant and the tenant meets all the requirements for BFPP status

with the exception of the all appropriate inquiry provision;
or

- the tenant has conducted an all appropriate inquiry and independently qualifies as a BFPP.

For BFPP Criteria as Applied to Tenants, click [here](#).

EPA may still pursue tenants where:

- the lease is designed to allow the landlord or tenant to avoid liability;
- the tenant is liable for reasons other than its status as a tenant; or
- the owner is not in compliance with state or federal regulatory requirements or administrative or judicial orders or decrees related to the leased property.

Parties entering into lease agreements for contaminated or potentially contaminated property should seek legal counsel to take full advantage of this new guidance.

For More Information

For further information as to your specific concerns, please contact a member of Polsinelli Shughart's Environmental and Natural Resources Group.

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