

## EPA Extends CERCLA Liability Protection for Tenants

DECEMBER 28, 2012

In December 2012, EPA issued revised [enforcement discretion guidance](#) regarding the applicability of the bona fide prospective purchaser (BFPP) defense to tenants of contaminated properties. EPA's revised guidance, which supersedes its 2009 guidance on the same subject, came out of its RE-Powering America's Land Initiative, a program by which the Agency has promoted renewable energy development on contaminated land and mining sites through redevelopment resources and technical support. Although the guidance was revised to address concerns related to renewable energy development, the guidance applies across all industries. EPA also issued three model no interest comfort/status letters but noted that these letters are intended to be used only in certain limited circumstances.

The BFPP defense to CERCLA liability applies to persons that acquire ownership of a facility after January 11, 2002, provided they meet various requirements and conditions, and tenants of such persons. Namely, all disposal of hazardous substances must have occurred prior to the BFPP's acquisition of the property. In addition, the BFPP is required to, among other requirements: conduct all appropriate inquiry (AAI) by performing an ASTM Phase I Environmental Site Assessment; provide legally required notices; take reasonable steps with respect to hazardous substance releases; provide cooperation, assistance, and access; and, comply with land use restrictions and institutional controls.

The revised guidance states that EPA will exercise its enforcement discretion on a site-specific basis to apply the defense to all tenants who fulfill the statutory BFPP requirements, regardless of whether the property owner also qualifies for the defense. Previously, EPA indicated it would apply the defense to tenants who had sufficient indicia of ownership to be considered an owner. Indicia of ownership include considerations such as the length of the lease, range of permitted uses, extent to which the tenant needs permission from the owner for certain actions, the owner's reserved property rights, and responsibility for taxes, insurance, and repairs. This expansion of EPA's enforcement discretion is important because the statutory language only extends the defense to property owners who can establish that the prerequisites to claiming the defense has been met, and tenants of those persons.

EPA noted that it may decline to exercise its enforcement discretion under various circumstances, such as if a lease is structured to allow the landlord or tenant to avoid its CERCLA liability, the tenant is potentially liable for reasons other than its status as a tenant (such as, arranging for the disposal of hazardous substances), or, the tenant is not compliant with state or federal regulatory requirements or cleanup orders.

2 Min Read

---

## Author

Eleni Kouimelis

---

## Related Topics

Renewable Energy

Rulemaking

Energy

## Related Capabilities

Environmental

*This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.*