

environmental lawflash

December 18, 2012

EPA Provides Comfort to Prospective Tenants at Contaminated Properties

Revised guidance details how tenants may benefit from the bona fide prospective purchaser protections under CERCLA.

The U.S. Environmental Protection Agency (EPA) on December 5 issued revised guidance¹ that addresses concerns raised by prospective tenants seeking to build renewable energy projects on contaminated properties. The revised guidance explains how tenants may benefit from the bona fide prospective purchaser protections under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). It describes when EPA intends to exercise its enforcement discretion and choose not to pursue tenants for cleanup costs under CERCLA. The revised guidance also provides model “comfort letters” that EPA’s regional offices may issue to prospective tenants to provide them with information regarding environmental conditions at particular sites and inform them of EPA’s policies with respect to tenants.

Background

Generally, the owner or operator of a facility where there is a release or threatened release of a hazardous substance is liable under CERCLA for the costs of the cleanup. CERCLA, however, provides protection from liability for an owner of contaminated property where (i) that person’s potential liability is based solely on his or her status as an owner or operator of the property, (ii) the person acquired the property after January 11, 2002, and (iii) the person satisfies eight criteria specified in the statute for bona fide prospective purchaser protection.²

The tenant of a bona fide prospective purchaser shares the liability protection enjoyed by the property owner. A tenant with such derivative bona fide prospective purchaser status retains that protection as long as the disposal of hazardous substances at the site occurred before acquisition of the site, the tenant does not impede the performance of any response action or natural resource restoration, and the owner maintains its status as a bona fide prospective purchaser. This statutory structure, however, provides no protection from CERCLA liability for prospective tenants where the property owner was not actually a bona fide prospective purchaser or where the property owner later loses its bona fide prospective purchaser status. This gap in protection concerned parties that wished to develop renewable energy projects on brownfields and other contaminated sites.

EPA’s Revised Guidance

The revised guidance addresses this concern by announcing EPA’s intent to exercise enforcement discretion with respect to the potential CERCLA liability of prospective tenants where the owner of the site loses its bona fide prospective purchaser status and where the owner of the site never had bona fide prospective purchaser status. In the case of a tenant of property where the owner loses its bona fide prospective purchaser protection through no fault of the tenant, EPA intends to exercise its enforcement discretion where the tenant satisfies CERCLA’s

1. View the revised guidance at <http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012.pdf>.

2. These eight criteria are (i) all disposal of hazardous substances at the site occurred before its acquisition; (ii) the purchaser performs all appropriate inquiry into previous ownership and uses of the site; (iii) the purchaser provides any required notices with respect to hazardous substances; (iv) the purchaser exercises appropriate care with respect to hazardous substances; (v) the purchaser cooperates and provides access for cleanup and natural resource restoration; (vi) the purchaser complies with any land use restrictions applicable to the site; (vii) the purchaser complies with subpoenas and requests for information; and (viii) the purchaser is not otherwise liable for the cleanup costs nor affiliated with the liable party.

criteria for a bona fide prospective purchaser exemption, other than the requirement to conduct all appropriate inquiry into prior ownership and use of the property. In the case of a prospective tenant of property where the owner was not a bona fide prospective purchaser, EPA intends to exercise its enforcement discretion and not pursue the tenant for CERCLA liability where the tenant satisfies all of the criteria for a bona fide prospective purchaser.

In both instances, EPA will not consider a lease between the tenant and the potentially liable property owner to be an affiliation that otherwise would preclude application of the policy. Under the revised guidance, a prospective tenant can take advantage of the liability protections under CERCLA available to bona fide prospective purchasers by establishing the following: (a) all disposal of hazardous substances at the site occurred before the tenancy; (b) the tenant conducted all appropriate inquiry into the previous ownership and use of the facility (not required where the owner had been a bona fide prospective purchaser but loses that status); (c) the tenant provides any legally required notices; (d) the tenant takes reasonable steps with respect to hazardous substances; (e) the tenant provides cooperation, assistance, and access to the site; (f) the tenant complies with land use restrictions and institutional controls that may be present at the site; (g) the tenant complies with information requests and administrative subpoenas; and (h) the tenant is not potentially liable for response costs at the facility nor affiliated with any such person (other than through the lease). Tenants who wish to benefit from EPA's exercise of its enforcement discretion must have entered into their leases after January 11, 2002. The revised guidance, although motivated by the development of renewable energy projects, is also applicable to other operations by prospective tenants.

Comfort Letters

A prospective tenant who satisfies these criteria for bona fide prospective tenant protection can request a "comfort letter" from EPA. The comfort letters available to prospective tenants do not preclude EPA from taking enforcement action, but they may provide prospective tenants with some comfort that they are not likely targets for CERCLA enforcement based on the information EPA has available with respect to the site and EPA's applicable policies, including the December 5 revised guidance on the application of CERCLA's bona fide prospective purchaser provisions. A comfort letter is not a no-action determination by EPA, nor does it preclude EPA from taking action in the future if warranted.

Implications

EPA's revised guidance and the comfort letters should help prospective tenants make better-informed decisions regarding the development of renewable energy projects and other activities. EPA's revised guidance and the comfort letters, however, do not protect tenants from claims asserted by states or private parties seeking to recover cleanup costs.

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