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To: mtammaro@rtenv.com

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EPA OFFERS BROADER TENANT LIABILITY RELIEF

Press Release

GOOD NEWS FOR REALTORS!

EPA is broadening liability protections for tenants leasing property on brownfields or other contaminated properties, responding to liability concerns from developers interested in participating in an EPA initiative to place renewable energy projects on potentially contaminated land.

A new guidance from EPA's waste and enforcement offices further extends a measure passed in a 2002 brownfields law aimed at protecting bona fide prospective purchasers (BDPPs) from cleanup liability at contaminated sites, allowing tenants to qualify for BFPP protections even if the property owner is not a BFPP. A 2009 BFPP guidance did not address liability protections for all lessees.

The impetus for the guidance is linked to EPA's push to locate renewable energy development projects on potentially contaminated properties under its RE-Powering America's Land Initiative, but the guidance applies across all industries, EPA notes in a transmittal letter accompanying the guidance. Issues over tenant liability in general arose five years ago, and at that time EPA officials said guidance was on option the agency was considering to alleviate confusion over the liability of tenants who rent from landowners at brownfields sites (*Superfund Report*, April 25, 2005). Since then, EPA issued a guidance in 2009 to address the issue, and these revisions build on that guidance.

"EPA heard concerns about federal enforcement under CERCLA being an issue for prospective tenants looing to redevelop contaminated sites particularly in the context of renewable energy projects," an EPA spokeswoman says. "While this issue was brought to the forefront through EPA's RE-Powering America's Land Initiative, EPA developed a broad policy that will help support redevelopment opportunities across all sectors."

EPA's enforcement head Cynthia Giles and waste chief Mathy Stanislaus Dec 5 signed updated guidance to regional offices putting in place protections. The guidance, contained in a memo titled "Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser

Provision," extends liability protections found in section 107® of the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA).

EPA has also issued three new model comfort/status letters for lessees involved in renewable energy development on contaminated sites. It says, however, that these should be used in limited circumstances and dependent on the availability of EPA regional office resources.

Under the new guidance, EPA provides the liability protections through the use of enforcement discretion aimed at treating certain tenants as BFPPs under CERCLA, although the agency says it may decline to exercise enforcement discretion in situations where the lease is designed to allow a landlord or tenant to avoid its CERCLA liability or the tenant is liable for reasons outside its tenant status, such as arranging for hazardous substance disposal at the site.

While the execution of a lease does not automatically make a tenant liable as an owner or operator under CERCLA, the guidance says "EPA recognizes the uncertainty regarding the potential liability of tenants under CERCLA and the potential applicability of the BFPP provision in light of the explicit reference to tenants in CERCLA [section] 101(40," the section that defines BFPPs and criteria they must meet.

EPA describes different ways in which a tenant can obtain and maintain BFPP status. These include a tenant deriving BFPP status from a landowner who satisfies the BPP criteria, a tenant meeting BFPP status, and situations where the owner was never a BFPP but the tenant meets BFPP requirements.

To meet the BFPP criteria in situations where the owner was never a BFPP, a tenant must: provide assurance that all disposal of hazardous substances at the site occurred prior to lease execution; conduct all appropriate inquiry (AAI) prior to execution of the lease; provide legally required notices; undertake "reasonable steps" with respect to hazardous substance releases; provide cooperation, assistance and access at the site; comply with land use restrictions and institutional controls; comply with information requests and administrative subpoenas; have no potential liability for response costs at the facility nor have "affiliated" with such persons other than through the lease with the owner; and taken no actions to impede any response actions at the site or natural resource restoration, the guidance says.

The guidance reiterates generally the same requirements as the 2009 guidance in addressing situations where the landowner already has BFPP status and the tenant derives its BFPP status from that, or causes where the tenant wants to maintain its BFPP status after the landowner lost that status.

To obtain BFPP status, a tenant can derive BFPP status from the owner as long as the tenant does not impede the cleanup remedy or natural resource restoration, the guidance says. The tenant, however, cannot continue to have derivative BFPP status if the owner loses its BFPP status.

But in situations where the owner loses BFPP status, tenants can retain the BFPP protections if they meet the same BFPP provisions under CERCLA prescribed for innocent prospective purchasers and for tenants where the landowner never was a BFPP, except for the requirement to conduct AAI into previous ownership and uses of the facility. This is because AAI has already been conducted by the owner in such cases, EPA explains in a footnote.

On the requirement that tenants, as a BFPP, have "no affiliation" with any other

liable party at the site, EPA is effectively widening an exemption for innocent land purchasers to also include tenants. While CERCLA already contains a "no affiliation" exception for parties acquiring title to a property from a liable party, the guidance notes leases would fail to fall within the scope of that exception.

"For purposes of this guidance, however, the EPA intends to exercise its enforcement discretion on a site-specific basis by not treating the existence of a lease between the tenant and the owner as a prohibited affiliation" the guidance says.

EPA says the statutory liability protections it cites in the guidance are self-implementing and the agency generally will not determine BFPP status on a site-specific basis.

An EPA spokeswoman says the agency currently has no other plans at this point in time to issue any other BFPP-related guidance.

(Superfund Report - 12/24/12)

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